



MILITARY LAW REVIEW

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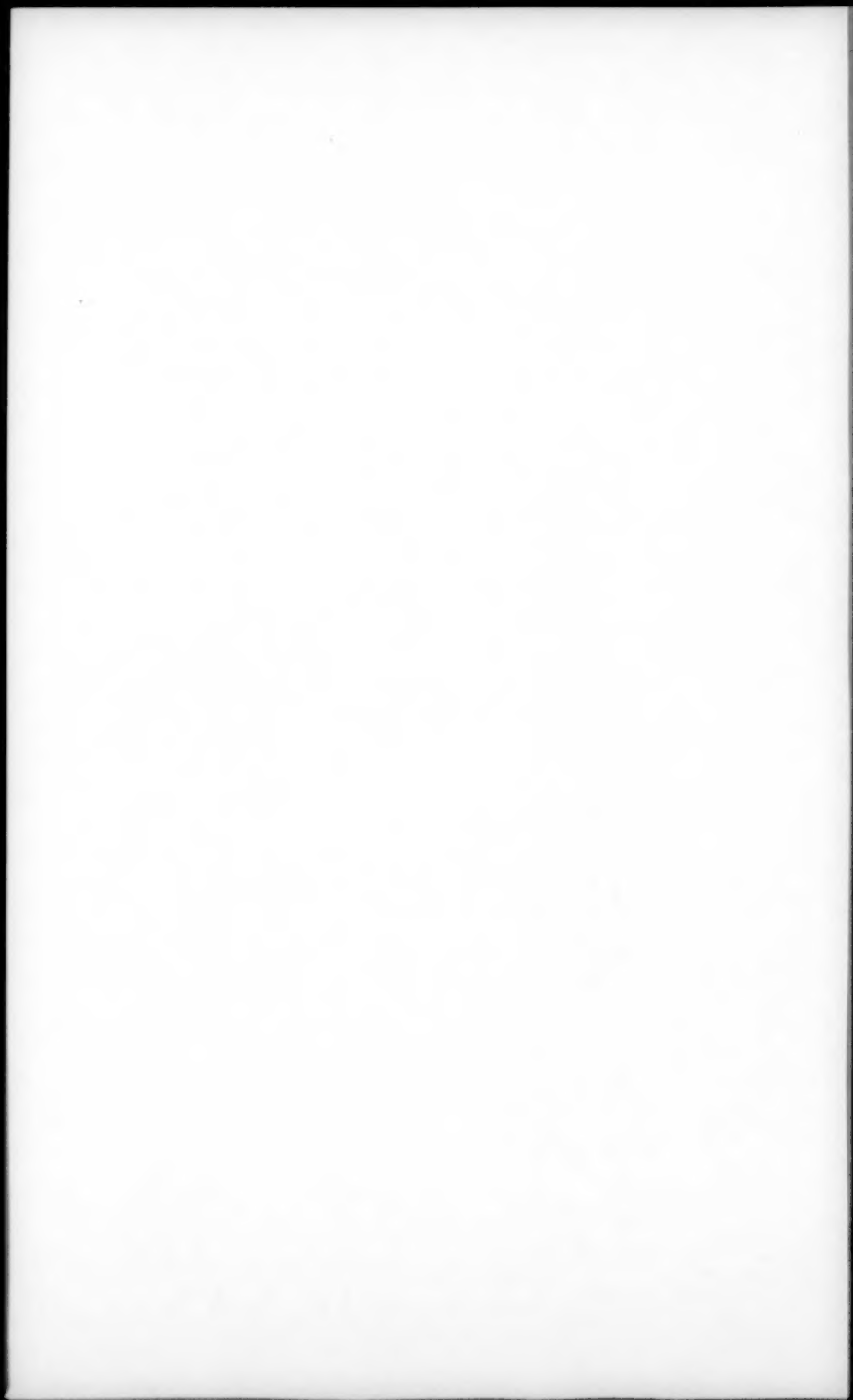
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THE TWENTY-SIXTH ANNUAL KENNETH J. HODSON LECTURE: MANUAL FOR COURTS-MARTIAL 20X¹

BRIGADIER GENERAL JOHN S. COOKE²

I. Introduction

It is truly a privilege to be here today. Major General Hodson was a real giant in our business, and a great gentleman. No one played a more important role than he did in shaping the military justice system we enjoy today, and few have equaled him in leadership and vision. I commend to you Major General Nardotti's superb exposition of General Hodson's career, given at this lecture two years ago, and published in volume 151 of the *Military Law Review*.³ I view the opportunity to speak as the Hodson lecturer as one of the high points in my career.

Almost twenty-six years ago, on 12 April 1972, General Hodson delivered the first Hodson lecture. I arrived in Charlottesville three days later to begin Phase II of the sixty-fourth Basic Course. At the time, I did not appreciate, or even know, what I missed, but I have since come to regret that I was not present for that address which is published in volume

1. This article is an edited transcript of a lecture delivered on 10 March 1998 by Brigadier General John S. Cooke to members of the staff and faculty, distinguished guests, and officers attending the 46th Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia. The Kenneth J. Hodson Chair of Criminal Law was established at The Judge Advocate General's School on 24 June 1971. The chair was named after Major General Hodson who served as The Judge Advocate General, United States Army, from 1967 to 1971. General Hodson retired in 1971, but immediately was recalled to active duty to serve as the Chief Judge of the Army Court of Military Review. He served in that position until March 1974. General Hodson served over thirty years on active duty, and was a member of the original staff and faculty of The Judge Advocate General's School in Charlottesville, Virginia. When the Judge Advocate General's Corps was activated as a regiment in 1986, General Hodson was selected as the Honorary Colonel of the Regiment.

2. Commander, United States Army Legal Services Agency, and Chief Judge, United States Army Court of Criminal Appeals.

3. Major General Michael J. Nardotti, *The Twenty-Fifth Annual Hodson Lecture: General Ken Hodson—A Thoroughly Remarkable Man*, 151 MIL. L. REV. 202 (1996).

57 of the *Military Law Review*.⁴ I commend it to you as well. The title of that address was "The Manual for Courts-Martial, 1984."

Remember that this was 1972. The 1969 *Manual*—which to the majority of people on active duty today is as ancient as the Dead Sea Scrolls—was less than three years old at that point. That *Manual* implemented the Military Justice Act of 1968, and included changes at least as far reaching as those instituted by the Uniform Code of Military Justice (UCMJ) in 1951. General Hodson was a prime mover in bringing about the 1968 changes. Nevertheless, he was already talking about additional changes.

Many of the changes General Hodson suggested that day have since come into effect: a separate chain of supervision for defense counsel; eliminating the requirement for the convening authority to detail military judges; reducing the convening authority's post-trial role to one of clemency; authority for interlocutory appeals by the Government; and direct review by the Supreme Court of decisions of the Court of Military Appeals, just to mention a few. Some others have not been adopted, such as: selecting court-martial panels by jury wheel; judge alone sentencing; and a system of standing courts-martial, known as "Magistrates Courts" and "District Courts." Many of these suggestions are still worth considering today.

In his article, General Hodson discussed how he came up with the name for his speech:

When I started to prepare these remarks, the title of my talk was to be, "The Manual for Courts-Martial—2001." After reading Alvin Toffler's *Future Shock*, I decided that I could not predict what is going to be here in 2001. I was encouraged to shorten my sights by a recent address by the Commanding General of the Combat Developments Command, entitled "The Army of the Seventies." I concluded that if the command that is charged with planning the Army of the future can't go any further than the Army of the 70's, which is now, it would be ridiculous for me to try to go out to 2001. So I settled for 1984.⁵

4. Major General Kenneth J. Hodson, *The Manual for Courts-Martial—1984*, 57 MIL. L. REV. 1 (1972). General Hodson published another discussion of the future of military justice in 1974. Kenneth J. Hodson, *Military Justice: Abolish or Change?*, 22 KAN. L. REV. 31 (1974), reprinted at MIL. L. REV. BICENT. ISSUE 579 (1975).

5. Hodson, *supra* note 4, at 5.

By incredible prescience or a remarkable coincidence, when the 1969 Manual was replaced, it was with the *Manual for Courts-Martial, 1984*. Today, I am not going to try to compete with that. I chose the somewhat cryptic title "Manual for Courts-Martial, 20X" in order to avoid pinning myself to a specific date. The Army has used "Force XXI" and the Joint Chiefs have used "Joint Vision 2010" to describe the forces of the future. The abbreviation "20X" is a hybrid of those, with enough ambiguity that I cannot be wrong.

As General Hodson did a quarter century ago, I do want to talk about how military justice might change over the next decade or so. The only unqualified prediction I will make is that military justice will change. As Thomas Jefferson said:

[L]aws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change of circumstances, institutions must advance also, and keep pace with the times.⁶

These words of Mr. Jefferson, which appear prominently on a wall at The Judge Advocate General's School, express more eloquently than I can, the necessity for military justice to change if it is to survive and thrive. The only question is how.

To address that question, I would like to do four things. First, I want to remind us of those basic principles which we must always keep in mind when addressing military justice. Second, I will briefly recount the history of military justice; I think it is essential to know where you have been and how you got where you are before setting off in new directions. Third, I will examine some of the trends and forces at work that will affect the military justice system. Fourth, and finally, I will discuss several specific changes I would make in our system, and some other areas that warrant careful study.

6. RICHARD HOFSTADTER, *THE AMERICAN POLITICAL TRADITION AND THE MEN WHO MADE IT* 56 (1973) (quoting Thomas Jefferson).

II. Basic Principles

As with most legal questions, a good place to begin is the Constitution. I know you are all familiar with the powers of Congress⁷ and the President⁸ over the armed forces and military justice, but I would like to begin with an even more fundamental point, the Preamble:

We the people of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.⁹

It is important to recall two things when you consider those words. First, as lawyers and as military officers, we have as large a role as any members of our society in helping to meet those goals that the Framers adopted. That is something of which we can be proud.

Second, those words remind us that all power flows from the people and that, through the genius of our constitutional structure, there is a direct bond between the people and the men and women in the armed forces. Every soldier, sailor, airman, and marine takes the following oath:

I do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.¹⁰

That oath is not to the President, the Congress, the Government, or to the fatherland or motherland; it's to the Constitution, and thereby to the people. At the same time, the people, through Congress and the President, assume responsibility for the men and women of the armed forces, and a

7. "The Congress shall have the Power . . . To Make Rules for the Government and Regulation of the land and naval Forces." U.S. CONST. art. I, § 8, cl. 14.

8. "The President shall be Commander in Chief of the Army and the Navy of the United States." U.S. CONST., art. II, § 2.

9. U.S. CONST. preamble.

10. 10 U.S.C. § 502 (1994).

primary means by which they have exercised that responsibility is mentioned in that oath—the UCMJ.

As those charged with the administration of the UCMJ, we must bear in mind our responsibility and accountability to the people and their elected representatives. This is our system; but in a greater sense it is theirs. We are simply the trustees.

The American people care very much about their soldiers, sailors, airmen, and marines. Although we can express concern that a preoccupation with casualties sometimes limits our country's freedom to act on the world stage, we can hardly deem it unhealthy that the people value highly the lives of their men and women in uniform. Think how sad it would be if they did not. At the same time, the people care greatly about how the military performs its missions. They expect it to fight and win our nation's wars, and to execute other missions flawlessly, and to do so in accordance with our country's values. They expect it to protect noncombatants, to treat the enemy humanely, and, above all, to take care of its own. Thus, they care very much how servicemembers are treated by our justice system—just witness the number of articles in the news about military justice in recent years. The American people want and expect an effective, disciplined force in which the rights of each servicemember are protected.

This concern for soldiers, sailors, airmen, and marines reflects another fundamental truth—what I call the eternal truth. Success in any military mission depends on many things: the equipment, the doctrine, the plan, the supplies, the weather, and so on. Such factors have varied greatly through history, but ultimately the success of every military mission depends on a group of relatively young men and women doing their jobs well under difficult, demanding, often dangerous circumstances. That success, their success, does not just happen; it is the product of a system of individual and group development which builds competence, confidence, cohesion, morale, and discipline. George Washington stated it best: "Discipline is the soul of an Army."¹¹

By discipline I mean not fear of punishment for doing something wrong, but faith in the value of doing something right. This aspect of military justice is often misunderstood. When we say we want a disciplined force, we do not mean we want people cringing in fear of the lash. This is not to deny the coercive power of the law or to suggest that it is unimpor-

11. D. S. FREEMAN, WASHINGTON 116 (1968).

tant; clearly it is. After all, at George Washington's request, in 1776 the Continental Congress increased the maximum number of lashes from 39 to 100.¹² But the coercive power of the law requires only the minimum, the lowest common denominator: it impels the lazy, the indifferent, and the cowardly to do what is specifically required of them on the battlefield, in order to avoid defeat and disaster. It does not, by itself, provide the motivation, the morale, to do the utmost necessary to encourage valor and to ensure victory. General George Marshall stated, "[i]t is not enough to fight. It is the spirit which we bring to the fight that decides the issue. It is morale that wins the victory."¹³

When we say we want a disciplined force, we mean we want people who will do the right thing when the chips are down. That discipline, ultimately, flows from within—it is that quality which motivates an individual and an organization to do the right thing even when the right thing is very, very hard to do.

The unfailing formula for production of morale is patriotism, self-respect, discipline, and self-confidence within a military unit, joined with fair treatment and merited appreciation from without . . . It will quickly wither and die if soldiers come to believe themselves the victims of indifference or injustice.¹⁴

Military justice is critical to the process of developing that kind of discipline—self-discipline coupled with high morale. Military justice establishes the basic standards of conduct for all men and women who wear the uniform, and it establishes the procedures by which those standards are enforced. Military justice does not simply impose discipline through deterrence and punishment. Military justice inculcates and reinforces discipline by consistently applying two fundamental principles: each person, regardless of rank, is responsible and accountable for his or her actions; and each person, regardless of circumstances, is entitled to be treated fairly and with dignity and respect.

Any critical analysis of our system must never lose sight of these basic truths. The military justice system is accountable to the American people and their elected representatives. The military justice system must

12. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, at 11 (Government Printing Office 1975) [hereinafter JAGC HISTORY].

13. BARTLETT'S FAMILIAR QUOTATIONS 771 (1980) (quoting General George Marshall).

14. *Id.* (quoting General Douglas MacArthur).

ensure that requirements are consistently applied and that established standards of conduct are met. The military justice system must protect the rights of all men and women who wear the uniform.

III. History: The Evolution of our Military Justice System

I would like to turn now to the history of military justice. This will, of necessity, be brief and therefore oversimplified, but I think it is important to remind ourselves of a few key points. General Sherman stated:

I agree that it will be a grave error if by negligence we permit the military law to become emasculated by allowing lawyers to inject into it the principles derived from their practices in the civil courts, which belong to a totally different system of jurisprudence.¹⁵

For the first 175 years of its history, military justice largely reflected General Sherman's view, and changed only slowly. It is not exaggerating to say that the criminal procedures which we used in World War II had more in common with those used in the Revolutionary War than the ones we used for most of the Korean War. Some important changes were made in the nineteenth century, and several more, including the first rather limited forms of appellate review, were established at the end of World War I.¹⁶ Nevertheless, for most of this period, the military was viewed as a separate society; our country's isolationism and its inbred distaste for standing armies (and a large navy) helped insulate the military justice system from outside pressure to change.

World War II and its aftermath changed all that. The war and the world situation in its wake led the United States to adopt a strategy of global engagement and to maintain large military forces to carry it out. This,

15. JAGC HISTORY, *supra* note 12, at 87 (quoting General William T. Sherman).

16. General Samuel Ansell, the acting Judge Advocate General at the end of World War I, proposed more sweeping changes. See Samuel Ansell, *Military Justice*, 5 CORNELL L.Q. (1919), reprinted at MIL. L. REV. BICENT. ISSUE 53 (1975). See also JAGC HISTORY, *supra* note 12, at 127-37; Major Terry W. Brown, *The Crowder-Ansell Dispute: The Emergence of General Samuel T. Ansell*, 35 MIL. L. REV. 1 (1967). Although most of General Ansell's proposals withered as the post-World War I Army shrank, many of his ideas were adopted in the Uniform Code of Military Justice three decades later.

along with evolving public attitudes about individual rights¹⁷ had a major and continuing effect on the military justice system.

During World War II, millions of citizens were exposed to the military justice system and many left believing that it was harsh, arbitrary, and, above all, far too subject to command manipulation.¹⁸ Following the war, the Department of Defense was established in order to meet the challenges of new global commitments.

As you know, dissatisfaction with military justice during World War II and the reformation of the defense establishment led to the enactment of the Uniform Code of Military Justice in 1950. The UCMJ was clearly an effort to limit the control of commanders over courts-martial; it increased the role of lawyers and it established a number of important rights for servicemembers, including extensive appellate rights. Among its most important features, it created the Court of Military Appeals which was intended to play, and has played, a critical role in protecting the integrity of the system. At the same time, it preserved many unique features of the old system, including a still very substantial role for commanders, in order to ensure that it would remain responsive to the special needs and exigencies of the military. Professor Edmund G. Morgan stated that "[w]e were convinced that a Code of Military Justice cannot ignore the military circumstances under which it must operate but we were equally determined that it must be designated to administer justice."¹⁹

In essence, enacting the UCMJ was the beginning of an effort to erect a true judicial system within the body of the military organization. This marked a radical shift. Instead of asserting, as General Sherman and many others did,²⁰ that civilian forms and principles of justice are incompatible

17. The era from 1945 to 1974 has been characterized as a "rights revolution" in the United States. JAMES T. PATTERSON, *GRAND EXPECTATIONS—THE UNITED STATES, 1945–1974*, at vii (1996).

18. See *Hearings on H.R. 2575 Before the Subcomm. of the House Comm. On Military Affairs*, 80th Cong., 1st Sess., at 2166-75 (1947). Approximately 16,000,000 men and women served in the United States armed forces during World War II. Over 2,000,000 courts-martial were convened. See Captain John T. Willis, *The United States Court of Military Appeals: Its Origin, Operation, and Future*, 55 MIL. L. REV. 39 (1972).

19. *Hearings on H.R. 2498 Before a Subcomm. of the House Armed Services Comm.*, 81st Cong., 1st Sess., at 606 (1949) (statement of Professor Edmund G. Morgan, Jr., Chairman, UCMJ drafting committee).

20. See, e.g., Professor Henry Wigmore: "The prime object of military organization is Victory not Justice . . . If it can do justice to its men, well and good. But Justice is always secondary and Victory always primary." JAGC HISTORY, *supra* note 12, at 87.

with military effectiveness, this effort rested on the largely untested precept that military effectiveness depends on justice and that, by and large, civilian forms and principles are necessary to ensure justice.

Since the UCMJ was established, the evolution of the system has been more rapid. The Military Justice Acts of 1968 and 1983 may be seen as the continuation of the process begun by the enactment of the UCMJ. They greatly expanded the role of lawyers, and the powers and responsibilities of judges, and further limited the role of commanders. Changes to the *Manual for Courts-Martial* have paralleled this process, and drawn our rules of procedure and evidence closer to those followed in federal courts. As mentioned, the Court of Military Appeals, now the Court of Appeals for the Armed Forces, has played a critical role as both an instrument and a catalyst for change. Finally, the services themselves have helped tailor changes to the UCMJ and the *Manual*, and have implemented internal changes, such as establishing structures to safeguard the independence of defense counsel.²¹

Thus, when the *Manual for Courts-Martial*, 1984, became effective, courts-martial looked a lot like their civilian counterparts. The biggest differences were not what happened in the courtroom, but in the role of commanders in bringing cases to trial and in acting on cases after trial.

The progress of the military justice system can be measured by its treatment in decisions of the Supreme Court. In the 1950s and 60s, the Court, in *Reid v. Covert*²² and in *O'Callahan v. Parker*,²³ rejected the notion that courts-martial were true instruments of justice and severely limited the jurisdiction of courts-martial. The Court described the military justice system in most unflattering terms.²⁴ In *O'Callahan*, the Court said:

21. This is not to suggest that the services and the Court of Military Appeals always acted in unison. Serious disagreements arose between the services and the court more than once. For example, in 1960, the Army issued what is known as the "Powell Report," so named for Lieutenant General Powell who headed the committee which drafted it. This report was blunt in its criticism of the Court of Military Appeals and its recommendations to undo some of the court's decisions. That year the Judge Advocates General and the court failed to produce a combined Annual Report, as was called for by Article 67(g) (now provided for in Article 146(a)). The late 1970s saw a similar period of division between the court and the Defense Department. See generally JONATHAN LURIE, PURSUING MILITARY JUSTICE (1998).

22. 354 U.S. 1 (1957).

23. 395 U.S. 258 (1969).

"[C]ourts-martial are singularly inept in dealing with the nice subtleties of constitutional law."²⁵

By 1987, the pendulum had swung the other way, and in *Solorio v. United States*,²⁶ the Court overturned *O'Callahan*, with little comment about the merits of the military justice system. More recently, in *Weiss v. United States*, the Court upheld our system of appointing military judges, with generally favorable comments about the military justice system. Justice Ginsburg's concurring opinion was especially positive:

The care the Court has taken to analyze petitioners' claims demonstrates once again that men and women in the Armed Forces do not leave constitutional safeguards behind when they enter military service. Today's decision upholds a system notably more sensitive to due process concerns than the one prevailing through most of our country's history, when military justice was done without any requirement that legally-trained officers preside or even participate as judges.²⁷

The evolution of the modern military justice system, from the enactment of the UCMJ to its maturation, confirmed in *Weiss*, roughly coincides with the period of the Cold War. This period saw courts-martial become real courts—independent judicial bodies, with procedures that have many more similarities than differences with civilian courts. At the same time, the system has been, as it must be, responsive to the needs of the armed forces. Our system works well, very well. In many ways, it is a model of fairness, although it does not get the recognition for fairness it perhaps

24. In *Reid* the Court said, "[t]raditionally, military justice has been a rough form of justice emphasizing summary procedures, speedy convictions and stern penalties with a view to maintaining obedience and fighting fitness in the ranks." 354 U.S. at 36-37.

25. *O'Callahan*, 395 U.S. at 265.

26. 483 U.S. 435 (1987).

27. *Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring).

deserves.²⁸ Nevertheless, it is not perfect, and we can never stop looking for ways to improve it.

Of course, the Cold War is over, and we are in a period of transition, some say even revolution. Next, I would like to look at some of the forces at work today that may affect how our system may change in the future.

IV. Trends

The first trend is that the size, organization, and missions of our armed forces will continue to change. This is a function of a turbulent world and a limited pocketbook. The disappearance of the Soviet threat and the need to reduce defense spending have, over the last decade, resulted in large reductions in the size, and some reshaping, of our armed forces. Most of the downsizing may be behind us, but more radical restructuring probably lies ahead. At the same time, the number of operations our forces have engaged in has grown exponentially. The nature of these operations has been as varied as their number, and the organizations conducting them have been distinctly ad hoc. We have used task forces specifically tailored for each operation, drawing on elements from many different units, and from all services and components. We have also relied increasingly on civilian employees and contractors as a key part of the force, as well as on allies and nongovernmental organizations. More of the same lies ahead. This has significant implications for military justice.

The second trend, which also affects the first, is one we hear about every day—the so-called information revolution. This ranges from fax machines to CNN to, of course, the Internet. For all its benefits, this also poses some problems. The speed with which information is moved depersonalizes and compresses the decision cycle—at a cost of the leavening effect on decision-making of old fashioned conversation and contemplation. Related to this is the phenomenon that what once might have been only a matter of local interest can now become an international incident in a matter of minutes. Aggravating these problems is the fact that the information is not always accurate; satellites and computers simply mean that one person's bad idea, or bad facts, can now be shared with millions, rather than dozens, almost instantly. Altogether, the availability and immediacy of so much data, good or bad, often imposes its own demands on or attrac-

28. See David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990s—A Legal System Looking for Respect*, 133 MIL. L. REV. 1 (1991).

tion to decision-makers to step in more readily and to decide more quickly than they would have otherwise.

The net effect of all this is to put decision-makers under much greater pressure. The judicial process is not immune from this—indeed it has become a major focal point of public interest in recent years. Witness O.J. Simpson, Louise Woodward, Monica Lewinsky, and our own Kelly Flinn. Greta Van Susteren has replaced Christiana Amanpour as the most frequently seen face on CNN. We now seem to approach criminal trials much the same way we do the Super Bowl, with hours of analysis, and with people choosing sides and gathering at the nearest watering hole to cheer, or boo, the results. Lawyers have also contributed to this process. Intentional leaks, public food fights between counsel, and scorched earth trial tactics are all too common. This is not conducive to calm, deliberative, dispassionate decision-making. We cannot expect judges to be monks, but neither should they be pollsters. This is also true of prosecutors and other decision-makers in the judicial process.

Our society's attitudes about crime and criminal justice are also changing. Although we still cherish our freedoms, our attitudes about crime have hardened. This has been particularly true of sentencing. Trends here have widened, not narrowed, the gap between us and our civilian counterparts. In many civilian jurisdictions, the erstwhile discretion of judges and parole boards has been curtailed, if not eliminated. The Federal Sentencing Guidelines²⁹ and "three strikes rules"³⁰ are but two examples of this.

We also see an increase in attacks on judicial independence.³¹ Such attacks are not really new—they have been with us since the beginning of the Republic.³² Nevertheless, there has been a recent upsurge in efforts by those who should really know better to call judges to account for their actions. Given the increased scrutiny of judicial decisions, even in seemingly routine cases, it is important that we ensure that judges are, and are

29. 18 U.S.C.A. (West 1996).

30. See, e.g., CAL. PENAL CODE § 1385 (West 1998).

31. See, e.g., *Impeachment Threats Decried*, WASH. POST, Feb. 2, 1998 at A5 (describing speech by the President of the American Bar Association).

32. See, e.g., JEAN E. SMITH, JOHN MARSHALL, DEFENDER OF A NATION 456 (1996); JOSEPH J. ELLIS, AMERICAN SPHINX, THE CHARACTER OF THOMAS JEFFERSON 222-23, 276-77 (1996) (describing Thomas Jefferson's scathing criticism of the judiciary and its independence).

seen to be, independent of the public furor which can rise as suddenly as a Midwest thunderstorm.

Looking directly at military justice, some other trends emerge. Caseloads remain well below where they were ten or twenty years ago, on both per capita and absolute bases. This has been a function of downsizing, and of higher recruiting standards, more aggressive use of administrative sanctions, including separation, and an effective urinalysis and anti-drug program. Caseloads seem to have leveled off in the last couple of years, and a tighter recruiting market may reduce standards slightly, but we are unlikely to see a huge increase in caseloads any time soon.

While the number of cases is down, however, the nature of what we do try is significant. We seem to see more crimes of an assaultive or sexual nature than before, and barracks larcenies have given way to thefts and frauds with checks, ATMs and computers. Moreover, our practice has grown much more sophisticated. When old guys like me brag about how many cases we tried—and the raw numbers were large—we usually fail to mention that a lot of it was like the surgery on MASH—competent, but mostly repetitive and uncomplicated. Today, on the other hand, a contested case that does not involve multiple motions, some tough evidentiary questions, and at least one expert is relatively rare. In military as in civilian courts, the role of science and experts has become more significant and more difficult for courts to deal with. In sum, we may be trying fewer cases today, but what we do try is relatively serious and tends to be more complex.

A side effect of this trend is often noted, namely the lack of trial experience of many of our counsel. The reduced caseload means that fewer opportunities arise for counsel to learn the basics, and the serious nature of the cases we do try means they are thrown into the deep end of the pool before they are really good swimmers. This is a problem, but it is exacerbated by more subtle problems. First, many commanders today lack in-depth knowledge of and experience with the military justice process. Second, many of our mid- and senior-level managers, chiefs of criminal law and Staff Judge Advocates (SJA), are stretched thin and lack the time or the experience to manage prosecutions and to guide these younger counsel as well as we would like. The result, too often, is mischarging or overcharging and going to court without a clear rationale or theory for what is brought to trial, as well as elementary procedural errors in the pretrial and post-trial processing. These deficiencies diffuse focus and divert attention from guilt or innocence and sentencing—no wonder young counsel strug-

gle. The shortcomings of counsel, commanders, and SJAs also lead to expedience and to disparities in disposition; for example, willingness to accept a negotiated plea or a request for discharge in lieu of court-martial, where, maybe, that is not in the best interest of the command, or of society—and I note those interests may not be identical.

Finally, the public's attitude about military justice should be considered. The public's, and more specifically the Congress' and our civilian leadership's increasing lack of familiarity with our legal system cannot be ignored. Fewer members of Congress have military experience than any time since World War II. Any initiative to secure changes, particularly legislation, must be undertaken with this in mind. This lack of familiarity increases the risk of changes that will do more harm than good.

When public attention has focused on the military justice system recently, most often it has centered on the question who decides how cases are disposed of and how the decision is made. The issue has not really been so clearly framed as that, but if you look at most of the recent well-publicized cases, the issue has not been whether someone can get a fair trial in a court-martial, but why someone was or was not going to trial at all. Tailhook, the Black Hawk shoot-down, Kelly Flinn, Khobar Towers—in all these cases and others, the focus has been whether the military was protecting people by not prosecuting them or was unfairly singling them out for prosecution.

Embedded in the questions that have been raised about these and other cases is a misperception—what I call the “myth of the monolithic Pentagon.” The media contribute to this by reporting that “The Pentagon” has decided to prosecute someone. We all know that neither the building itself nor any actual person in it exercises that function. Although people in the Pentagon must often live with or explain someone else's decision to

prosecute or not to prosecute, their power to influence such decisions is severely limited.³³

In fact, our system is almost the opposite: a classic "power-down" model. Decisions on the disposition of offenses begin, and often end, at the lowest levels. The discretion of higher level commanders can be constrained by the prior decisions of lower commanders. This is a product of our hierarchical system, and of rules against unlawful command influence especially designed to protect servicemembers from certain effects of this system. Because of our history, a number of rules operate as "default mechanisms" in favor of the accused. Consequently, power is diffused, resulting in the increased likelihood of disparity of decisions concerning disposition. Our rules against unlawful command influence prohibit issuing general guidelines, exacerbating the disparity problem.

This diffusion of power, especially when viewed through the myth of the monolithic Pentagon, sometimes leads the public to believe that the power to prosecute is exercised arbitrarily. Recent criticisms often suggest that we circle the wagons to protect favorites and that we throw scapegoats to the wolves. I don't think this is an accurate criticism, but our diffused decision-making structure may provide some fuel for this fire.

Most of us are quite comfortable with the commander's prerogative to determine the disposition of cases. When we look at cases like those I have mentioned, we appreciate and for the most part agree with the judgment calls that commanders made with advice from their lawyers. We see this process as a natural function of command; the commander is responsible for the performance of his or her unit, including the morale and discipline of its members. Therefore, the commander should decide whether to invoke the judicial process or whether some other action is appropriate. Many of us would view turning this function over to lawyers or someone else to be a usurpation of command authority.

A closer look at how our system works, however, reveals that this rationale for command authority does not apply so purely in practice as it

33. Of course, the Secretary of Defense and the service secretaries can convene courts-martial under Article 22, but this would be unprecedented. The service secretaries do exercise some powers that may affect whether a servicemember is court-martialed. *See, e.g.,* U.S. DEP'T OF ARMY, REG. 27-10, MILITARY JUSTICE, para. 21-3c (24 June 1996) (concerning secretarial approval to activate a reserve component soldier for the purpose of court-martial); U.S. DEP'T OF ARMY, REG. 635-120, OFFICER TRANSFERS AND DISCHARGES, para. 3-13 (21 July 1995) (concerning discharge of an officer in lieu of court-martial).

does in theory. First, more often than we like to think, we have separated operational and disciplinary authority. Area jurisdiction overseas and local jurisdiction over tenant units on installations are two examples. High profile or unusual cases also sometimes warrant special procedures. The Navy and Marine Corps each appointed a specific convening authority to handle the "Tailhook" cases.

Moreover, the increasing use of ad hoc organizations in contingency operations typically gives rise to convoluted command lines; the most frequent solution as far as court-martial jurisdiction is concerned is to leave disciplinary authority with the parent unit and farm actions back to it as necessary. Indeed, the operational commander is not always staffed for UCMJ actions and does not want to be saddled with it.

The same is true in joint operations. We usually keep court-martial jurisdiction along service lines, even when the service convening authorities have no operational responsibility. This is true even in long standing joint operations. For example, Operation Provide Comfort had existed under European Command for several years when two Air Force F-15s shot down two Army Black Hawk helicopters, yet jurisdiction was exercised by service commanders who had no responsibility for the operation.

We should also recognize that the commander's interest in morale and discipline in the unit, important as it is, is not the only consideration in deciding how to dispose of a case. Especially as our caseload involves more common law crimes, the civilian society's interest in disposition becomes greater.³⁴ Society has an interest in how we dispose of an accused child molester, for example, beyond its general interest in how we maintain discipline and safety in our own community; it wants to know if we are going to allow such a person to come back and live in the community without appropriate punishment. Most commanders genuinely try to consider such interests when making disposition decisions. Nevertheless, a tension sometimes exists between getting a miscreant out of our ranks and society's broader interests in punishment and rehabilitation—a tension aggravated by the fact that the convening authority may have to expend substantial money on such a prosecution—money which could otherwise fund training or community welfare activities. Again, in most cases, I am

34. The elimination of the "service-connection" requirement in *Solorio v. United States*, 483 U.S. 435 (1987), not only expands court-martial jurisdiction; it also increases the number of cases tried by courts-martial in which civilian society may have a greater interest.

confident that we do the right thing. However, at the margins, that may not always be the case, and citizens may reasonably ask how and why such decisions are made.

Don't get me wrong. The current system works well. Very good reasons exist for our power down model and for the flexibility and discretion it provides.

My point is twofold: we cannot ignore the public's perception of how we exercise prosecutorial discretion, even if we think the perception is wrong. We should also recognize that, in practice, our basic line of defense for reposing this power in commanders—that responsibility for mission is coterminous with responsibility for the criminal process—is not as pure and impregnable as we would like to think. Although I believe in the current system, I think command discretion and our power-down model will be a point of criticism and vulnerability.

All these trends—our changing missions and force structure, the information revolution, attitudes about crime and developments in the civilian justice system, and our own court-martial workloads and public perceptions about military justice—will affect how our system operates and evolves in the coming years. At the same time, we must remember the fundamental truths I addressed earlier. With all this in mind, I turn next to some possible areas of change.

V. Proposals and Possibilities

I divide this portion of my remarks into two parts. First are some changes I would make if I were king. Some are more feasible than others in today's climate; I devote more attention to those I think are most important and more feasible. After discussing these, I will address several areas in which I think, based on trends mentioned earlier, we should be prepared either to defend the status quo or to advance acceptable alternatives. In other words, these are areas in which I think our system will be tested and questioned and it behooves us to think now about why we should or should not change, as well as how we might change.

A. Proposals

1. *Tenure for Military Judges*

We won the constitutional battle over appointment of and tenure for military judges in *Weiss v. United States*.³⁵ Now it is time to recognize that tenure for judges, as a matter of policy, is appropriate. At the outset, let me emphasize that I have no doubts about the actual independence of our judges today. The Judge Advocates General I have worked with and for have had great respect for the independence of our judges, and none would think of removing or otherwise penalizing a judge because of a judge's ruling. Moreover, I am confident our judges make their decisions based on the law and their conscience, without fear of second guessing.

Nevertheless, our current rules do little to allay the perception that our judges serve at the pleasure of the Judge Advocate General. In fact, that is not true; our judges effectively have tenure now. We just don't get credit for it. That's because it is in unwritten and therefore not clearly defined form. As a practical matter, our trial and appellate judges are normally assigned to a judicial position for a standard tour, typically three or four years, and we would not reassign a judge because of his or her decisions.

We should begin by including a tenure policy for trial and appellate judges in our regulations. This is a little more complicated than I have made it sound, but basically it would provide that each judge would be assigned for a set period, normally three years, and could not be reassigned without his or her consent, except for good cause. Good cause would be defined to include commission of a serious offense or violation of the Code of Judicial Conduct.³⁶ A removal process would be established, consistent with Rule for Courts-Martial 109. This should involve either the chief judge of a service or a panel of judges who would make recommendations to TJAG; TJAG could not remove a judge absent a recommendation to do so. I note, however, that Article 66 (g)³⁷ would preclude appellate judges,

35. 510 U.S. 163 (1994).

36. A carefully crafted provision allowing reassignment under well-defined military exigencies could also be included. This could be tied, for example, to periods in which the President has authorized activation of Reserve units or individuals. See 10 U.S.C. §§ 12301-304 (1994).

including the chief judge, from participating in such review in the case of another appellate judge.

Such provisions would significantly reduce the perception that military judges serve at the pleasure of The Judge Advocate General and are, therefore, subject to pressure from him. Ultimately, I would like to see us go further and establish such tenure in the UCMJ. This could also include a more formal selection process, and some longer term benefits. I have in mind here a provision that an officer completing at least one tour as a military judge would enjoy the same retirement benefits as a colonel with thirty years service, at that officer's thirty year point, even if he or she retired sooner and at a lower rank.³⁸ This would ensure we continue to attract some of our best to the bench and would further ensure the reality and the perception of their independence.

I should also mention here the possibility of a joint judiciary, both trial and appellate. I see advantages and disadvantages to this. On the plus side, a "purple" judiciary might be viewed as even more independent, and it would probably result in some slight savings in manpower. On the other hand, lack of familiarity with the unique aspects of each service could be a problem in a few cases, and, more significantly, could be perceived as a problem by commanders, accuseds, and other servicemembers, undermining the prestige of and respect for the judiciary. I see a "purple" judiciary as somewhat dependent on the continued evolution of jointness in general; we will probably have it someday, but I do not think we are quite ready yet.

37. Article 66(g), UCMJ, provides as follows:

No member of a Court of Criminal Appeals shall be required, or on his own initiative be permitted, to prepare, approve, disapprove, review, or submit, with respect to any other member of the same or another Court of Criminal Appeals, an effectiveness, fitness, or efficiency report, or any other report documents used in whole or in part for the purpose of determining whether a member of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of a member of the armed forces, or in determining whether a member of the armed forces shall be retained on active duty.

38. For example, a lieutenant colonel who had completed a prescribed tour as a military judge and who retired after twenty-five years of service would receive the retired pay of a retired lieutenant colonel with twenty-five years of service for five years. Once this officer reached the date at which he or she would have had thirty years of service, the retired pay would increase to that of a colonel who had served for thirty years. The delay in the higher pay is designed to reduce the attraction of retiring early.

2. Judge Alone Sentencing

We studied the question of judge alone sentencing twelve years ago and concluded that sentencing by members, in members trials, should be retained.³⁹ Since then, however, we have seen the movement in civilian courts toward greater uniformity in sentencing, and the nature of our caseload has continued to swing toward crimes against society, not just against the military. Also, I think court members are less familiar with military justice generally; while this is not so important on findings, where, in effect, a structured yes or no question must be answered, it is important to the much more discretionary and unstructured question of an appropriate sentence. So I think it is time for another look.

In its favor, judge alone sentencing would bring, I am confident, greater uniformity and consistency. It would also make it easier to present more information at the sentencing phase, without fear that it would be used improperly. Certainly, it would be more efficient, both in terms of the court-martial itself, and by freeing the members for other duties.

On the other hand, the system would lose something. Members bring a 'sense of the community' that judges cannot entirely duplicate. Although that 'sense' sometimes includes considerations that some of us would think came from left field, it also includes appreciation of unique aspects of military life that can be very important, especially when dealing with certain military type offenses. This often works in the accused's favor and could be considered an important protection.

Although I have no great problem with the current system, if I could, I would go to judge alone sentencing in all except capital cases.

3. Fix the Jurisdictional Void Over Civilians Overseas

The absence of criminal U.S. jurisdiction over civilians accompanying our armed forces overseas, except in time of declared war, has existed for several decades now and has been the subject of much debate and concern, and frequent proposed remedies.⁴⁰ I will not retrace that history here; it is sufficient to recognize that civilian family members, employees, and

39. See Advisory Commission to the Military Justice Act of 1983 Report (copy on file with Criminal Law Division, OTJAG); see also Pub. L. No. 98-209, § 9(b), 94 Stat. 1404 (1983). See also Major Kevin Lovejoy, *Abolition of Court Member Sentencing in the Military*, 142 MIL. L. REV. 1 (1993).

contractors accompanying our armed forces overseas who commit offenses overseas are generally subject to prosecution, if at all, only in the courts of the host country.

Last year I participated in a congressionally directed study⁴¹ by the Defense and Justice Departments to look at this issue. Our study, which reviewed the law on the subject, and which gathered data and comments from each of the services and from the combatant commands, confirmed the view that this is a serious problem in need of a solution.

For years the attention has focused on family members and civilian employees who commit crimes in foreign countries where U.S. forces are permanently based. There have been occasional horror stories of murderers or child molesters who have returned to the United States unpunished because we had no jurisdiction and the host country could not or would not prosecute. Nevertheless, these cases have been relatively rare because the host nation often has taken jurisdiction in serious cases; indeed, we have occasionally encouraged such exercise.⁴² Most frequently, these cases have arisen in countries in whose justice systems we have confidence.

The problem could get much worse, however. In recent years we have engaged in exercises and operations in countries with no effective government—indeed, the reason we go is often because of some breakdown in law and order—or in countries whose justice systems are so different from ours that we would be most reluctant to submit one of our citizens—even one who apparently committed a serious crime—to their jurisdiction. We are also taking more civilians with us as key participants in these operations. It is not hard to imagine the problem if a U.S. civilian employee murders an allied soldier or rapes a local national, or is plausibly accused of such offenses, and we cannot prosecute the individual. This is not only a question of justice, it is a question of national security, for if we

40. See U.S. Dep't of Defense, General Counsel's Office, Overseas Jurisdiction Advisory Committee, Section 1151, Pub. L. No. 104-106, Report to The Secretary of Defense, The Attorney General, The Congress of the United States.

41. *Id.*

42. Generally, our policy is to exercise U.S. jurisdiction when possible. See U.S. DEP'T OF ARMY, REG. 27-50, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (15 Dec. 1989); U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 5820.4G, STATUS OF FORCES POLICIES, PROCEDURES, AND INFORMATION (14 Jan. 1990).

fail to take appropriate action the adverse impact on the morale and safety of our forces and the success of the mission is obvious.

Our study group recommended two courses of action. First, expand the jurisdiction of federal courts to allow them to try offenses committed by civilians accompanying the armed forces overseas.⁴³ Expense and logistical hurdles will ensure that this vehicle would be used only infrequently, but it would provide a needed avenue for addressing serious offenses which might otherwise go unpunished.

Second, expand court-martial jurisdiction to cover civilians accompanying the armed forces during certain contingency operations. The President or the Secretary of Defense would specifically designate such operations, the geographic area covered, and the civilian employees or contractors would be notified of their subjection to such jurisdiction. There is, of course, a substantial constitutional question concerning such jurisdiction, but I believe an appropriately tailored and narrow statute could pass constitutional muster.

4. Other Suggestions

In addition to the three proposals I have just made, I list some other changes I would like to see.

a. Codify the offenses now listed under Article 134 in paragraphs 61 through 113 of Part IV of the Manual

There is no good reason why some of our most serious and common crimes, like indecent assault, kidnapping, obstructing justice, and communicating a threat should not be the subject of specific punitive articles.

As part of this, a common definition for the offense of fraternization should be established for all the services. I like the Army's, but, whatever it is, it should be uniform.

43. Specifically, the Overseas Jurisdiction Committee recommended extending jurisdiction to federal (Article III) courts to try such offenses which are punishable by imprisonment for more than one year if committed within the special maritime and territorial jurisdiction of the United States. See 18 U.S.C. § 7 (1994).

b. Abolish summary courts-martial

General Hodson recommended this in 1972. To hold that these are really courts-martial applying rules of evidence and so forth is to ignore reality.

c. Make Article 15 more flexible

We should provide (by statute, if necessary) that, except when a reduction in grade is imposed, the imposing commander decides whether a record of nonjudicial punishment will be filed in the servicemember's permanent record. This would give commanders more latitude to use Article 15, without the career implications for the soldier we have now. I would also like to see correctional custody more widely available and used.

d. Provide that Article 32 Investigating Officers be lawyers

The complexity of our practice calls for this. The Article 32 Investigation is primarily a probable cause and discovery hearing. Its function as a means of determining level of disposition is far less significant in most cases. Lawyers can better and more efficiently serve the purpose of Article 32.

e. Improve court facilities

Our court facilities range widely in quality. We must always retain the ability to try a court-martial in a tent, but our permanent facilities should all reflect a set standard in terms of furnishings, configuration—including access by the judge and members, deliberation rooms, and witness waiting areas—and wiring (for use of advanced technologies). They do not have to be the Taj Mahal, but well laid out and dignified courtroom complexes lend themselves to professionalism by the participants and enhances the very important perception of justice. Central funding may be needed for this.

B. Possibilities

Apart from the above areas that I would change if I could, I wish to address several others which I think warrant critical examination. I think these areas will come under scrutiny because of one or more of the trends I mentioned earlier. We need to examine the status quo and whether there

may be better ways of doing things. I do not think I would change some of these areas; others I would be more willing to modify though I am not certain how.

1. Prosecutorial Discretion and the Role of the Convening Authority

I described how public attention has tended to focus on prosecutorial discretion—and, therefore, on the role of the convening authority. I am not suggesting our system is wrong or broken, but I believe we must be prepared to demonstrate that our prosecutorial decisions are not based on favoritism, parochialism, or other inappropriate considerations.

We need to look hard at the role of convening authorities. What training and guidance do commanders get and what should they receive? Do we need to promote more uniformity? If so, how? Can we, and should we, issue guidelines or establish other mechanisms in pursuit of greater uniformity? In this regard, I note that the Department of Justice (DOJ) issues guidelines on prosecution for its U.S. Attorneys, and that before they can proceed with certain types of cases, such as capital cases and organized crime cases, U.S. Attorneys must coordinate with the DOJ.

Would it be more efficient and effective to vest court-martial referral authority, at least for general courts-martial, in a relatively few commanders? This issue becomes even more significant if we radically reorganize and if the trend toward ad hoc task organization continues. On the other hand, should we more rigorously follow operational command lines, including joint lines, in exercising disciplinary authority? Another alternative, which I do not advocate but which should be studied, is to turn the authority to prosecute over to lawyers altogether. This was seriously proposed in the 1970s.⁴⁴ This might promote uniformity and efficiency, but I think the price is too high in terms of command authority and commanders' responsibility for discipline.

We should not, we cannot, take the status quo for granted. It may be the best way to do things, but I predict it will come under much closer scrutiny. We had best prepare to defend it or to submit our own proposals for revising it or it may take a form we find hard to accommodate.

44. See Hodson, *supra* note 4.

2. *Selection of Court Members*

Our system of selecting court members has long been a subject of criticism and is vulnerable to the perception of unfairness.⁴⁵ General Hodson called for replacing it with a jury wheel system in 1972. If we significantly change the powers of commanders, as I have discussed above, then, of course, this process would also have to change. Otherwise, I would not change it. Granted, the current system leaves open the potential for and the perception of abuse, more than a "random" selection process would. Nevertheless, in my experience I have been impressed with the dedication and fairness of our panels. I believe our system provides us with better educated and more conscientious panels, on average, than any other system would. Careful enforcement of rules concerning unlawful command influence and the availability of penetrating voir dire and a liberal challenge philosophy have protected the integrity of the process.⁴⁶ Furthermore, a system of random selection of members could be administratively cumbersome and disruptive of military operations, and it would not necessarily eliminate perceptions that members, who would in most cases come from the convening authority's command, are not truly independent.

I am not unalterably opposed to changing the system of selecting court members; I think the perception problem is a real one. I just do not have a better idea, and I am satisfied the current system is in fact fair. This is a subject which warrants continued study.

3. *Sentencing*

As I mentioned before, the trend in civilian jurisdictions has been strongly in the direction of tougher sentences and, more importantly, of mandatory sentences—meaning less discretion for the sentencer, the trial judge in most jurisdictions. Our system, by contrast, affords the court-martial almost total discretion in sentencing. Except for a very few offenses, like premeditated murder, which have a prescribed mandatory minimum, the members or the judge are free to adjudge any sentence, from

45. See generally *Findlay v. United Kingdom*, 24 Eur. H.R. Rep. 221 (1997) in which the European Court of Human Rights held that a process of appointing court-martial members by the commander (very similar to the U.S. system) in the United Kingdom violated the European Convention on Human Rights.

46. Cf. *Weiss v. United States*, 510 U.S. 163, 181-82 (1994).

no punishment to the maximum authorized, and, no matter how lenient the sentence they adjudge, their sentence cannot be increased.

This results not only in occasionally very light sentences, but in less consistency overall. While our system of clemency review by the convening authority and sentence appropriateness review by the Courts of Criminal Appeals can ameliorate truly harsh sentences, there is no mechanism to correct aberrations at the other end.

Aggravating the problems with sentencing are our current rules—and I use the term “rules” loosely here—on multiplicity. Recent efforts by the Court of Appeals for the Armed Forces, intended to simplify the law in this area, have only muddled it further.⁴⁷ In the process, they have had the effect of encouraging multiple charging—to avoid losing closely related but not technically included offenses—while treating fewer offenses as multiplicitious. The result has been to increase maximum punishments, and therefore the range of discretion for the sentencer.⁴⁸ I agree with Judge Effron and Professor Barto that the President should act, using his authority under Article 56, to clarify the area.⁴⁹ I am thinking along the lines of providing the trial judge express authority to group offenses for sentencing purposes, even when they are technically separate, in accordance with certain guidelines. Most civilian systems allow for concurrent sentencing for multiple offenses.⁵⁰

My proposal on judge alone sentencing also has relevance here. How you decide this issue may affect whether there should be other changes in our sentencing procedures. The issue of broad discretion on sentencing is a real one. Congress recently reacted to one aspect of this by enacting rules requiring forfeiture of pay in certain circumstances.⁵¹ In effect, this estab-

47. See, e.g., *United States v. Neblock*, 45 M.J. 191 (1996); *United States v. Oatney*, 45 M.J. 185 (1996); *United States v. Weymouth*, 43 M.J. 349 (1993); *United States v. Morrison*, 41 M.J. 482 (1995); *United States v. Foster*, 40 M.J. 140 (1994); *United States v. Teters*, 37 M.J. 370 (1993).

48. Many trial judges have tried to mitigate the harshness of this effect by continuing to hold offenses multiplicitious for sentencing, even though this is technically error. *United States v. Morrison*, 41 M.J. 482 (1995). But see *United States v. Criffield*, 47 M.J. 419 (1998) (“Although the judge was within his discretion to treat these offenses as multiplicitious for sentencing, we hold that the judge did not err as a matter of law by finding that the offenses were not multiplicitious for findings.”).

49. See *United States v. Britton*, 47 M.J. 195, 202 (1997) (Effron, J., concurring); Major William T. Barto, *Alexander the Great, the Gordian Knot, and the Problem of Multiplicity in the Military Justice System*, 152 MIL. L. REV. 1 (1996).

50. See, e.g., 18 U.S.C. § 3584(a) (1994); 18 U.S.C. app. 3D1.1, 5G1.1 (1994).

lished a form of mandatory minimum sentence; was this only the first step? Should it be? I do not advocate anything as comprehensive and cumbersome as the Federal Sentencing Guidelines for our system, but we should look at whether we should provide more guidance to sentencers and to promote greater uniformity in sentencing, and, if so, how.

4. Technology

I cannot begin to imagine all the ways technology will affect our system over the next decade, but a few developments are pretty obvious, even to a technologically impaired person like me. First, we should be able to initiate charges and track a case, and prepare and forward all documents, including the record of trial, electronically. Indeed, if someone will produce a more reader friendly computer screen that you can hold in your lap like a book, we will not need paper, or at least as much paper. This will change habits and administration more than it will change substance, but it has the potential to improve processing times which have become alarmingly slow at the trial and appellate levels. Anything we can do to speed things along will be beneficial.

Second, videoteleconferencing (VTC) capabilities now permit remote access to witnesses and perhaps even to the parties. Recently, the Army Court of Criminal Appeals condemned the practice of holding telephonic arraignments, with the judge in one location and the counsel and accused in another, at least under most circumstances.⁵² That opinion points out some UCMJ provisions which could preclude even videoteleconferencing sessions,⁵³ although this remains subject to interpretation. Certainly, there are some constitutional requirements which must be met, but in a community as mobile and as far-flung as our military society, VTC offers great promise for increased efficiency.

Obviously, the drafters of the Code and the Manual never considered these technological possibilities when the rules were written. Rather than

51. See UCMJ art. 58b (West Supp. 1997); Pub. L. No. 104-106, § 1122(a)(1), 110 Stat. 463 (1996).

52. United States v. Reynolds, 44 M.J. 726 (Army Ct. Crim. App. 1996)

53. See, e.g., UCMJ art. 39(a): "These proceedings [at which the military judge presides] shall be conducted in the presence of the accused, the defense counsel, and the trial counsel . . ." Query: does "presence" mean physical presence, or is virtual presence enough?

leave some important policy questions to the courts, I submit that consideration be given to revising the rules to expressly address this issue.

Third, the increasing significance of scientific evidence and expert testimony has important implications. These include not only what is or is not admissible, and how to help factfinders rather than confuse them—I think courts will work that out under our current rules, albeit with some difficulty. A less noticed but no less important systemic issue is the cost associated with this evidence which carries the real risk of making some courts-martial too expensive to handle out of a command operating budget. A single case can easily run up bills in the six figures. Equally important is ensuring that the defense has fair access to pursue and present such evidence. Again, I do not know the answer, but I am sure we will face the problem.

5. Judge Advocates and the Administration of Justice

I mentioned earlier the concerns that are often expressed about the advocacy skills of counsel, and my concern about the degree of attention and experience which SJAs and Chiefs of Criminal Law often bring to the administration of military justice. I do not have a simple solution to this problem. We have expanded and improved on training, especially advocacy training, and our leadership has put special emphasis on the importance of our military justice mission. Clearly, we need to continue to do this.

With respect to counsel, along with teaching them the techniques of advocacy, we must provide a strong foundation in ethical rules and ensure they understand and respect the judicial process. They must understand the difference between the dogged pursuit of justice and a dogfight. We need them to help preserve the dignity of the deliberative process. This is one area where we really do not want to follow the civilian trend.

More attention also needs to be paid to the role and responsibility of staff judge advocates. My sense is that many SJAs do not pay a lot of attention to the details in most cases. Unfortunately, when SJAs do become involved in the details, sometimes it is with a zeal that creates its own problems. I do not want to be interpreted as suggesting that SJAs must become trial counsel. It is the SJA's job to see that the system works fairly—this includes, but is not limited to, ensuring that cases are prosecuted effectively. More often, though, the problem is too little attention, not too much. Many SJAs now do not have extensive backgrounds in

criminal law, and there are many competing demands for an SJA's time, but if we fail in this area, we might as well turn in our crests.

Failure here could lead to radical change. One alternative may be specialization; some JAs have suggested it in informal polls taken by the JAG School. Whatever the merits of such a system in its own right, we are much more likely to see pressure to move in that or some other radical direction if we fail to advise convening authorities and to administer the system properly. We must continue to emphasize the importance of this mission, and include military justice training in SJA courses and CLEs.

VI. Conclusion

"The older I grow, the more apt I am to doubt my own judgement."
—Benjamin Franklin⁵⁴

In conclusion, if I have done nothing else, I hope I have stirred some thought. I certainly do not claim to have all the answers. Of this I am sure. We have a great system. We can all be proud of it. I am very proud, and grateful, to have served this system for most of my adult life. I am confident that it will continue to be a great system. It will change, and it is important that we give serious thought to how it should change.

As we engage in such a process, I urge you to always keep in mind our system's constitutional roots, its accountability to the American people, its role in ensuring morale and discipline, and its relationship to the eternal truth—that the young men and women upon whom we depend for success in any endeavor must have faith in the value of doing things the right way. Military justice must reinforce that faith.

54. See SMITH, *supra* note 32, at 111.

THE ELEVENTH ANNUAL WALDEMAR A. SOLF LECTURE: THE CHANGING NATURE OF THE LAWS OF WAR¹

HER EXCELLENCY JUDGE GABRIELLE KIRK McDONALD²

I. Introduction

Thank you for inviting me here today to share with you some of my experiences as a Judge and now President of the International Criminal Tribunal for the former Yugoslavia. I must confess to having been a little daunted when I was initially informed that I would be expected to provide

1. This article is an edited transcript of a lecture delivered on 9 February 1998 by Judge Gabrielle Kirk McDonald to members of the staff and faculty, distinguished guests, and officers attending the 46th Graduate Course at The Judge Advocate General's School, Charlottesville, Virginia. The Waldemar A. Solf Lecture in International Law was established at The Judge Advocate General's School on 8 October 1982. The chair was named after Colonel Solf who served in increasingly important positions during his career as a judge advocate. After his retirement, he lectured at American University for two years, then served as Chief of the International Affairs Division, Office of the Judge Advocate General. In that position, he represented the United States at numerous international conferences including those that prepared the 1977 Protocols Additional to the 1949 Geneva Conventions. After his successful efforts in completing the Protocol negotiations, he returned to Washington and was appointed the Special Assistant to The Judge Advocate General for Law of War Matters. He served in that position until his second retirement in August 1979.

2. Judge Gabrielle Kirk McDonald is the President Judge of the International Criminal Tribunal for the Former Yugoslavia. Judge McDonald was elected by the United Nations General Assembly to serve as one of the original eleven judges on the International Tribunal September 1993. She was re-elected on 20 May 1997 for a second four-year term and on 19 November 1997, the Judges of the ICTY endorsed by acclamation her nomination as President. Judge McDonald was the presiding judge of the trial chamber that heard the first war crimes case in an International Tribunal since Nuremberg and Tokyo after World War II. Prior to her election to the International Tribunal, Judge McDonald had a varied and successful law career. After graduating from Howard University School of Law in 1966, *cum laude* and first in her class, Judge McDonald began a legal career which took her from the NAACP Legal Defense and Educational Fund to the position of federal district judge in Houston, Texas (1979-1988). After resigning this position, Judge McDonald became a partner with a major law firm in Texas and has taught at several law schools in the United States. Judge McDonald was serving as the Distinguished Visiting Professor of Law at the Thurgood Marshall School of Law, Texas Southern University, when she was elected to the Tribunal.

two hours of entertainment. Since the time has been reduced to one hour, I am certain that you and I will find this experience more enjoyable.

I consider it to be a true honor to address you. Here at the Judge Advocate General's School, you are given an opportunity to learn about an area of the law that has been neglected and dormant for decades: the law of war. It is now alive again, being applied and developed, yet few people know about it. You are the exception. With the knowledge you are acquiring here, you will be in a position to make a significant contribution to the development of jurisprudence in this specialized field. I hope that you will find my remarks thought-provoking.

The International Criminal Tribunal for the former Yugoslavia (ICTY) has competence to prosecute persons for serious violations of international humanitarian law.³ It is truly in its infancy and as such has not developed a comprehensive or complete set of rules governing the conduct of armed conflicts. Therefore, I will not give you today a "ten commandments of warfare." You have your military manuals and your rules of engagement and some of you have undoubtedly participated in drafting them. However, with the emergence of ad hoc criminal tribunals and the probability, if not certainty, that a permanent International Criminal Court will be established this year, those who engage in the conduct of warfare should be aware that their behavior may be judged by standards developed by the international community.

Therefore, what I will do is to give you the benefit of our limited jurisprudence, which has addressed some of the issues pertaining to the laws of war and has changed in specific ways the normative framework of such law. When I say limited, I am referring to the fact that my fellow judges and I have only been called upon to consider a finite number of matters, for we have heard only one full trial and one sentencing procedure, the latter

3. The International Committee of the Red Cross defines this body of law as comprising:

[i]nternational rules, established by treaty or custom, which are specifically intended to solve humanitarian problems, directly arising from international or non-international armed conflicts, and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.

Jean Pictet, *International Humanitarian Law: Definition*, in *INTERNATIONAL DIMENSIONS OF HUMANITARIAN LAW* (UNESCO, Henry Dunant Institute, Mutinus Nyhoff Publishers 1988).

also being subject to review by our Appeals Chamber. The Appeals Chamber considered jurisdictional issues in a decision rendered prior to the commencement of that trial and heard an appeal of the sentencing ruling on both jurisdictional issues and the availability of duress as a complete defense to the killing of unarmed civilians. Today, I will focus on these issues and suggest possible consequences of these rulings.

II. The Cycle of Impunity

I would first like to provide some background for my remarks. The twentieth century is best described as one of split personality: aspiration and actuality. The reality is that this century has been the bloodiest period in history. As improvements in communications and weapons technology have increased, the frequency and barbarity of systematic abuses of fundamental rights have likewise escalated, yet little has been done to address such abuses.

A cursory study of any history book reveals that impunity is not a new phenomenon. However, the crystallization of the cycle of impunity is very much a twentieth century concept: perpetrators of massive human rights violations have often been supported, rather than held accountable, by the international community. The result has been to encourage repetition by the perpetrators and by those who are inspired by their impunity. Perhaps the most infamous example is Hitler's observation to his senior officers in 1939: "Who after all speaks today of the annihilation of the Armenians?"

The voice of aspiration is the evolution among States from individual to common values. Beginning at the close of the nineteenth century, the community of nations, by limiting warfare, has first gradually and then regularly, recognized that individuals possess certain incontrovertible rights as members of the human family, and that States, acting individually and collectively, have both an interest and a duty to observe and to enforce those values. Such reasoning provided the basis for the creation of international organizations, beginning with the League of Nations and the United Nations and for undertakings such as the Nuremberg trials, the four Geneva Conventions of 1949, and for the subsequent human rights covenants, treaties, and mechanisms to enforce at national and supra-national levels the proclaimed rights.

It is here that the effects of the split personality are discernible. The Armenians whom Hitler predicted would not be remembered are perhaps the best example. Between a half and one and a half million Armenians

were interned and killed between 1915 and 1921.⁴ Most of the males were executed, the women and children were forced to march into the desert without food, shelter, or means to defend themselves against desert tribesmen. To date, this destruction of human life has been a non-event. Neither the victims of these acts have been acknowledged, nor the perpetrators brought to justice.

That such suffering should be memorable only as an instructive (or should I say destructive) example is proof of how wide the chasm is between theory and reality. With few, but notable, exceptions, there has been no reckoning for the great majority of mass violations of human rights throughout this century; perpetrators have either not been identified, or have not been required to account for their crimes.

The prevalence of such impunity has placed expediency above both principle and pragmatism.⁵ As recent events demonstrate, allowing perpetrators of such atrocities to remain in power not only puts the world's stamp of approval on impunity but allows the cycle to be repeated. By virtue of the stature of such perpetrators, it also sets a norm of behavior which their subordinates follow. These crimes are committed against individuals, yet they are also crimes against all humanity; there must be respect for the principles of equality of all human life and for the universal application of justice and of the law. To undertake to protect rights and then fail to prevent or to redress their abuse is both inconsistent and an affront to that universality. The law is abused and debased by such conduct.⁶

The Tribunal is committed to the proposition that there will be no lasting peace without justice. As a practical matter, when victims are denied justice it may lead to acts of vengeance.⁷ The failure to identify and to attach responsibility to individuals results in the stigmatization of entire societies and the possibility of renewed conflict as in Rwanda, Burundi,

4. Figures are disputed but President Bush is quoted as saying that more than one million people were killed. See *Bush Avoids the Word Genocide on American Massacre Anniversary*, JERUSALEM POST, Apr. 22, 1990.

5. While short-term pragmatism may dictate a de facto granting of impunity, long-term stability requires the creation of conditions conducive to peace and reconciliation.

6. See the comments of the political secretary of the British High Commission in Istanbul: "it were better that the Allies had never made their declarations in the matter and had never followed up their declarations by the arrests and deportations that have been made [*sic*]." FO 371/6500/, app. A (folio 385-118, 386-119), 11 August 1920 [British Foreign Office papers].

7. Such as the assassinations in the 1920s of several individuals allegedly responsible for atrocities committed by the government of Turkey against the Armenians.

and the former Yugoslavia where recent bloodshed has been ascribed to what are termed "ancient ethnic hatreds." Impunity is also a failure to acknowledge on a broader level that atrocities have been committed, which precludes societal reconstruction and reconciliation; perpetrators retain their power and influence, preventing the return of refugees and the reinstitution of a pluralistic society.

These are not mere words; scholars estimate that over one hundred seventy million non-combatants have been killed in episodes of mass killings in the twentieth century. A further forty million combatants have died in conflicts. That is a total of over two hundred and ten million people, or one in every twenty five persons alive today—truly a figure that defies the imagination.

This brings me to the theme of my talk today: war and the changing nature of the laws of war. Laws whose purpose is to govern the conduct of war should by definition be based on the way war itself is conducted. The primary coalescence of this law took place in two stages, around one hundred years ago, and in the aftermath of the Second World War, fifty years ago. In the intervening decades the way in which wars are fought has changed; we can no longer strictly characterize conflict as international or internal, as belligerent or insurgent.

As the number of States increased dramatically, a variety of factors—a desire for economic development, the fears of minorities within the new States, discrimination by majority groups, interference, often military, in new States by former rulers—caused frequent bloodshed. These 'conflicts' were characterized by the involvement of various parties and by the perception of civilians as targets, by reason of their association with combatants, rather than as casualties. As the distinction between war and civil strife blurred, so too did that between non-combatant and combatant.

As the Appeals Chamber stated, "a State-sovereignty-orientated approach has gradually been supplanted by a human-being orientated approach."⁸ Therefore, I submit that the dichotomy that characterizes

8. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, paras. 72 & 73 (2 Oct. 1995) [hereinafter *Tadic Interlocutory Appeal Decision*].

international humanitarian law—whether the conflict is international or internal—is untenable at the end of the twentieth century.

III. The International Tribunals

The ICTY has reflected this change in focus through its jurisprudence. Before going on to discuss this and related substantive issues, I would like to give you a brief sketch of the Tribunal, what it does and how it does it.

The Security Council, having found that the widespread violations of international humanitarian law occurring within the former Yugoslavia constituted a threat to international peace and security, exercised its powers under Chapter VII of the Charter of the United Nations to establish the ICTY. As a subsidiary organ of the Council, all member States are required to cooperate fully with it and to comply with requests for assistance or with orders it issues.

The ICTY is governed by its Statute, adopted by the Security Council following a report by the United Nations Secretary-General. Its eleven judges are drawn from States around the world. The proceedings are also governed by Rules of Procedure and Evidence adopted by the judges in February 1994, and amended from time to time. The ICTY is not subject to the national laws of any jurisdiction and has been granted both primacy and concurrent jurisdiction with the courts of States.

Subject-matter jurisdiction is stated in Articles 2 to 5 of the Statute which consists of the power to prosecute persons responsible for grave breaches of the Geneva Conventions of 1949 (Article 2), for violating the laws or customs of war (Article 3), for committing genocide, as defined in the Statute (Article 4), and for crimes against humanity when committed in armed conflict (Article 5), which are beyond any doubt part of customary international law.

Our sister institution, the International Criminal Tribunal for Rwanda, is located in Tanzania and Rwanda. It has jurisdiction over violations of international humanitarian law committed in Rwanda in 1994 and over Rwandan citizens committing such crimes. Its subject-matter jurisdiction is limited to genocide, crimes against humanity and violations of common Article 3 and of Additional Protocol II. It thus applies those components

of international humanitarian law which beyond doubt apply to internal conflicts.

The Tribunals are composed of two Trial Chambers and a Registry each, and share an Appeals Chamber and a Prosecutor's Office. I am the only American among the eleven judges of the ICTY, which is based in The Netherlands.

Since its establishment nearly five years ago, the Tribunal has evolved and is on the road to fulfilling its potential. As Presiding Judge on the first full trial, and now as President, I have been involved closely in that growth and I offer the following comments based on that experience. However, the Tribunal speaks through its judicial pronouncements, and thus my remarks should be construed accordingly.

A. Procedural Law

One of our major contributions has been how we practice law. When the judges were installed in November 1993, the field of international criminal procedure was essentially a vacuum. Since then, we have literally created an international judicial institution—the first of its kind. We had no rules of procedure or evidence and no courtroom. In just over four years of operation, the Tribunal has filled the void by establishing a code of procedure, and a body of case law. We have completed one full trial, one sentencing procedure and three appellate proceedings. Four further trials are in progress; five trials, a sentencing procedure, and one appeal are pending. In addition to some three hundred procedural decisions interpreting our rules, we have developed jurisprudence concerning matters such as the international protection of victims and witnesses. Equally important, we have codified procedures on a range of practical matters, such as a legal aid system, a code of conduct for counsel, the maintenance of a purpose-built detention unit supervised by the I.C.R.C., the rights of persons detained there, and counseling and support for victim witnesses, for whom the act of testifying is often extremely traumatic.

B. Substantive Law

The Tribunal was established by the community of States to prosecute horrendous crimes committed in a conflict which has been characterized as both internal and international. In deciding the issues before it, the Tribunal has been called upon to consider some of the issues that go to the heart of the nature of warfare. Our resulting jurisprudence has effects on

both the conceptual elements of humanitarian law and on its practical effect: the conduct of individual soldiers in the field.

Turning first to the conceptual: the categorization of conflicts as international or internal does not in any way vitiate the egregious nature of the crimes committed, nor the unspeakable suffering already endured by their victims. Indeed, the ambiguity regarding the classification obscures the necessity of protecting the rights of individuals in armed conflicts. There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities committed in internal conflicts more leniently than those engaged in international wars. In our decisions on Articles 2 and 3 of the Statute, we have approached this issue in two ways. In attempting to ascertain the character of the conflicts in the former Yugoslavia, we have both extended and limited the scope of international humanitarian law.

1. Article 3

First, the expansive approach. Article 3 of our Tribunal's Statute states that the Tribunal "shall have power to prosecute persons violating the laws or customs of war." It lists as examples five proscribed acts, including the use of poisonous weapons, wanton destruction and attack of undefended areas, and plunder of property. In his report which led to the establishment of the Tribunal, the Secretary General noted that Article 3 was based on rules of customary law, primarily the 1907 Hague Convention (IV) Respecting the Laws and Customs of War and annexed Regulations.

In *The Prosecutor v. Tadic*,⁹ the defense challenged the Tribunal's jurisdiction under Article 3, arguing that the Hague Regulations were only applicable in international conflicts, and that as the conflict was internal, the Tribunal lacked jurisdiction. The defense also claimed that even if the prohibitions detailed in the Hague Regulations were applicable in any armed conflict, the prohibitions themselves did not entail the individual criminal responsibility of those who committed any of the prohibited acts.

The Trial Chamber found that it had jurisdiction, because laws or customs of war had become a part of customary international law and thus the

9. *Prosecutor v. Dusko Tadic*, Case No. IT-94-I-T.

character of the conflict was irrelevant. It further held that violations constitute criminal acts, for which the perpetrators are liable.

The majority of the Appeals Chamber held that Article 3,

is a general clause covering all violations of humanitarian law not falling under Article 2 or covered by Articles 4 or 5, more specifically, violations of the Hague law on international conflicts; infringements of provisions of the Geneva Conventions other than those classified as 'grave breaches'; violations of common Article 3 and other customary rules on internal conflicts; [and] violations of agreements binding on the parties to the conflict considered *qua* treaty law.¹⁰

In making this finding, the majority stated that four conditions must be satisfied to render a violation subject to Article 3: (1) the commission of a proscribed act must constitute an infringement of international humanitarian law; (2) that law must be customary in nature, or if it is derived from a treaty, the treaty's conditions must be met; (3) the violation must constitute a breach of a rule protecting important values which has important consequences for the victim; and (4) the violation of the law must entail the individual criminal responsibility in international law of the perpetrator of the violation, under customary or conventional law.¹¹

The Chamber reviewed state practice in civil conflicts ranging from the Spanish Civil War to the fighting in Chechnya, the views of some of the members of the Security Council as to the scope of Article 3, and the practice of international organizations such as the International Committee of the Red Cross (ICRC) and the General Assembly. Based on this analysis, the Chamber found that there had developed a body of customary international law governing the conduct of internal conflicts, applying to such areas as the protection of civilians and civilian objects and the prohibition of certain means and methods of warfare proscribed in international armed conflict.

The Chamber then found that violations of such laws were crimes under international law. The Chamber drew on the dicta of the Nuremberg Tribunal and further examples of State practice to conclude that there was "no doubt [that violations] entail individual criminal responsibility,

10. Tadic Interlocutory Appeal Decision, *supra* note 8, para. 89.

11. *Id.* para. 94.

regardless of whether they are committed in internal or in international armed conflicts No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition."¹²

It is here that the Tribunal has contributed most to the changing nature of the laws of war. By expanding the applicability of Article 3, the Chamber amplified the protections afforded to those caught up in internal conflicts. However, I should add that the Appeals Chamber imposed two limitations on its findings: only certain proscriptions on international armed conflicts had been extended to internal wars; and the extension included the essence of the prohibitions, rather than the detailed provisions.

2. Article 2

By contrast, if you look at our jurisprudence on Article 2 of our Statute, you might say that the Tribunal has gone in the opposite direction. Again, I am talking about the *Tadic* case. The defense challenged jurisdiction under Article 2, alleging that it applied only to international armed conflicts and that the offenses charged occurred in an internal conflict.

Trial Chamber II, over which I presided, found that as "the element of internationality forms no jurisdictional criterion of the offences created by Article 2."¹³ Article 2 applied to both international and internal conflicts. Our Chamber reasoned that the Report of the Secretary-General had made it clear that the rules of international law intended for application should clearly be part of customary law and that the reference to the law of the Geneva Conventions in Article 2 had become part of this customary law. Moreover, we held that Article 2 is self-contained, save in relation to the definition of protected persons and things. Therefore, there was no ground for importing into our Statute the whole of the terms of the Geneva Conventions. In other words, Article 2 of the Geneva Conventions was designed to make grave breaches applicable to international armed conflicts and we considered that our Statute was concerned with the grave breaches, rather than with the context in which they were committed.

After an appeal by the defense, the Appeals Chamber created a standard. The majority ruled that a determination that the armed conflict in

12. *Id.* para. 129.

13. Trial Chamber Opinion and Judgment, Case No. IT-94-I-T, para. 53 (7 May 1997) [hereinafter Trial Chamber Opinion].

question was international was indeed required for jurisdiction under Article 2. It first stated that the "grave breaches" provision of the Geneva Conventions "are widely understood to be committed only in international armed conflicts."¹⁴ Yet the Chamber admitted "that this conclusion may appear not to be consonant with recent trends of both State practice and the whole doctrine of human rights, which . . . tend to blur in many respects the traditional dichotomy between civil wars and civil strife."¹⁵

The Chamber found that "the offences listed under Article 2 can only be prosecuted when perpetrated against persons or property regarded as 'protected' by the Geneva Conventions under the strict conditions set out by the Conventions themselves."¹⁶ It stated that "[c]learly, these provisions of the Geneva Conventions apply to persons or objects only to the extent that they are caught up in an international armed conflict."¹⁷ Unfortunately, the Appeals Chamber gave little guidance on how to determine whether a particular conflict is international or internal in nature, or whether a person is "protected," except for finding that he or she must be caught up in an international conflict.

Two of the three Separate Opinions disagreed with the majority on this point. One judge found that Article 2 was applicable in internal and international armed conflicts, while another concluded that the Chamber should view the armed conflict in the former Yugoslavia, as a whole, as international.

The Appeals Chamber, then, wielded a double-edged sword. By extending the scope of Article 3, the Chamber sought to make the Tribunal's statutory jurisdiction incontrovertible. Such a wide expansion was legally appropriate, but it led to the limitations that were imposed on our

14. Tadic Interlocutory Appeal Decision, *supra* note 8, para. 71.

15. *Id.* para. 83.

16. *Id.* para. 81.

17. *Id.* para. 81.

Article 2 jurisdiction. Thus, what was given with one hand was taken with the other.

Failure to clarify, at least in part, the relationship of these two canons of our Statute could have resulted in substantive problems in their relative interpretation and application.

Unclear as to the effect of these dispositions, the Trial Chamber in *Tadic* considered it wise to receive evidence on the issue of the character of the conflict. After a four and a half month trial, in May 1997, the majority of the Trial Chamber held that while the conflict in question was initially international in character, at the time relevant to the indictment,¹⁸ the victims were not in the hands of a party to the conflict or occupying power of which they were not nationals. The majority reasoned that after 19 May 1992, Bosnian citizens could be considered in the hands of non-nationals and thus "protected persons" as defined by Article 4 of Geneva Convention IV only if the Bosnian Serbs (the captors) were agents of the Federal Republic of Yugoslavia.¹⁹

The majority found that the Bosnian Serb Army was largely established, equipped, staffed, and financed by the Yugoslav Peoples' Army. It then applied the test developed by the International Court of Justice in the *Nicaragua* case,²⁰ which requires a showing of effective control to prove agency; it found that there was no direct evidence of such "effective control." It was of the view that the forces in whose hands these particular Bosnian citizens found themselves "could not be considered as *de facto*

18. After 19 May 1992

19. The majority stated:

[I]t is neither necessary nor sufficient merely to show that the V.R.S. [Bosnian Serb Army a.k.a. the Army of the Republika Srpska] was dependent, even completely dependent, on the V.J. [Belgrade Serb Army] and the Federal Republic of Yugoslavia (Serbia and Montenegro) for the necessities of war. It must also be shown that the V.J. and the Federal Republic of Yugoslavia . . . exercised the potential for control inherent in that relationship of dependency or that the V.R.S. has otherwise placed itself under the control of the Government of the Federal Republic of Yugoslavia.

Trial Chamber Opinion, *supra* note 13, para. 588.

20. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27).

organs or agents of the Federal Republic of Yugoslavia."²¹ Thus, Article 2 did not apply to the offenses charged in the indictment.

I disagreed with the majority by finding that Article 2 did indeed apply to the circumstances of the case. I was of the view that at all times relevant to the indictment, the armed conflict in the area in question was international in character and that the victims were "protected persons." I found that the majority had misapplied the Nicaragua test, and created one that was even more demanding. In my opinion, "the proper test of agency from Nicaragua is one of 'dependency and control' and a showing of effective control is not required";²² such a standard being one for determining State, and not individual, responsibility. However, I also concluded that the more rigorous "effective control standard" was also satisfied because I considered that the evidence supported beyond reasonable doubt the finding that the Bosnian Serb Army was an agent of the Federal Republic of Yugoslavia and that the victims were accordingly protected persons.

The majority's finding that Article 2 was not applicable necessitated a verdict of not guilty for the accused on all eleven of the charges indicted under Article 2. But the accused had also been indicted under Article 3, for violations of common Article 3 of the Geneva Conventions, for the same acts as those indicted under Article 2. We thus rested our legal findings as to the guilt of the accused on Article 3.

Applying the Appeals Chamber tests, the Trial Chamber found the accused guilty of various offenses, including cruel treatment and murder. Thus, even though Article 2 was expressly designed, unlike Article 3, for the protection of non-combatants, our experience indicates that Article 3 will be used as a "safety net," even if it may not have been so intended.

What, then, are the effects of the double-edged sword? Well, as the *Tadic* Judgement indicates, it has little practical consequence for the accused. If the Prosecutor is able to meet the lower jurisdictional pre-requisites for Article 3, we have a means for adjudicating guilt without going to Article 2. But this is not to pretend that the current status of Article 2

21. Trial Chamber Opinion, *supra* note 13, para. 607.

22. *Id.* para. 4.

has no consequences for the Tribunal. Indeed, they may be extremely grave, both for the Tribunal and for national prosecutions.

In both the former Yugoslavia and in other conflicts, there are simply too many potential accused for any international tribunal ever to try them all. It is thus essential that the bulk of prosecutions are undertaken by national authorities, in accordance with the principle of universal jurisdiction. The need to prove internationality of the conflict places a further hurdle in the track of national prosecutions under the grave breaches regime. It is possible that either States will not follow our jurisprudence or that the Tribunal's affirmation of the application of common Article 3 and other parts of international humanitarian law to internal conflicts may establish a viable national prosecutorial alternative. However, even though there is universal jurisdiction over grave breaches and a mandatory obligation to search for and to prosecute or extradite those who commit such offences, only one fourth to one third of the 188 countries that have signed the Geneva Conventions have national legislation adequate to prosecute grave breaches. There were no such prosecutions until 1994.²³ If States were not willing to make such changes to their domestic laws to prosecute grave breaches, they may be even more reluctant to incorporate international norms applicable to internal conflicts, which have been applied to international conflicts, only by virtue of customary international law. In a recent discussion, Lord Avebury, told me he had unsuccessfully tried to incorporate common Article 3 into British penal legislation.

However, a recent positive development in this area has in fact occurred in the United States, which now includes violations of common Article 3 within its definition of war crimes.²⁴ However, the limited jurisdiction of the Statute over only United States citizens and members of the armed forces, reduces its potential effectiveness. Would death squad commanders or mercenaries who sought sanctuary in the United States be subject to criminal prosecution in this country?

The present view of the Tribunal regarding grave breaches has the effect of limiting States' jurisdiction to international armed conflicts. Although the Appeals Chamber's discussion of Article 3 clarified the law, bringing it into line with the reality of modern warfare, its decision to limit

23. Paul Berman, Legal Adviser on International Humanitarian Law at the International Committee of the Red Cross, in conversation with the author, November 1997.

24. War Crimes Acts of 1996, 18 U.S.C.S. § 2441 (Law. Co-op. 1997).

Article 2 went against the grain. The state of the law is thus once again out of step with the state of world affairs.

There is, however, the opportunity for a change in the Tribunal's limitation of Article 2 to international conflicts. The Appeals Chamber noted that the opinion of the United States that Article 2 applies to international and internal conflicts, as stated in the amicus brief it filed, indicated a possible change in State practice and *opinio juris*, which, if supported by further similar developments, could bring about a change in the customary law of grave breaches. Perhaps the first step on this road is a 1994 decision by a Danish court which applied the grave breaches provisions to the Bosnian conflict without considering the character of the conflict, although I should add that the Appeals Chamber considered this case when reviewing Article 2.²⁵ If State practice continues in the direction of the Danish court, the Tribunal could reconsider its finding. However, this matter may be left to future *ad hoc* Tribunals or the permanent International Criminal Court.

Other implications of the Tribunal's jurisprudence on this matter may only be evident in the longer term. One of the Tribunal's roles is to establish a historical record of what happened in the former Yugoslavia, of what led to the perpetration of such appalling atrocities and how they were committed. Such a role is as important as prosecutions, if the Tribunal is truly to contribute to the maintenance of international peace and security, in the region and beyond. The limitations on the applicability of Article 2 may distort the record by not providing an account of the involvement in the conflict of foreign actors, which is a feature common to many so-called 'internal' wars. A conflict could, of course, be attributed to wholly internal factors. However, if it was instigated and supported by foreign States, a true record demands that such actions are also addressed. A standard that requires direct evidence of effective control to render the conflict international, or even the very requirement that it be international, forecloses reference to the fact of foreign involvement. Thus, only a part of the historical record is established.

The danger of distorting the record is four-fold: (1) outside agents/actors escape responsibility and culpability for their actions; (2) the absence of an accurate account prevents comprehensive reconciliation and deterrence of future atrocities; (3) historical amnesia is encouraged in the States that may have participated in the conflict and those States where the

25. Prosecutor v. Refik Saric, Case No. IT-95-12-R61, para. 82 (13 Sept. 1996) (Appeals Chamber Decision).

conflict occurred; and, (4) perhaps most seriously, it accords further legitimacy to the international-internal debate, thereby clouding the evolution of humanitarian law and misplacing the focus on the character of the hostilities rather than the protection of individuals in conflicts.

It is worth noting that to date, our Trial Chambers have issued four decisions pursuant to Rule 61 of our Rules of Procedure and Evidence in which they held the conflicts in the former Yugoslavia to be international. Under this procedure, the Chamber may hold a public and ex parte hearing to receive evidence from the Prosecutor in support of an indictment in cases of a failure or refusal by States to execute arrest warrants.²⁶ In one of these decisions—*Prosecutor v. Rajic*²⁷—the Chamber based its finding on evidence that established Croatia's direct military involvement in the conflict and its control over Bosnian Croat forces in central Bosnia. For the remaining three, the Trial Chambers found that the Federal Republic of Yugoslavia had been involved in conflicts within Bosnia. As preliminary decisions, however, the precedential value of these findings is clearly less than the final judgments. Also, if the Judges uphold the strict *Tadic* agency test, a different finding could be made on the same facts with respect to internationality.

It is also with respect to the historical record that, conversely, we can discern a benefit of the current majority view of Article 2. The effect of the Appeals Chamber Decision is to reserve one ground of subject matter jurisdiction for the identification of the complicity of outside States. A prerequisite to obtaining a conviction would be proof of such involvement, be it directly, as in *Rajic*, or indirectly, using a form of the agency test.

Another effect is more subtle. A decision by the Prosecutor not to bring charges under Article 2 has the natural effect of making the issue of involvement of foreign States irrelevant. If charges are lodged only under Article 3 of the Statute, since it has been held to apply to both internal and international armed conflicts, the evidence would focus on internal ele-

26. Such a Rule 61 proceeding is essentially a reconfirmation of an indictment, and thus the standard of proof required is that a prima facie case be established or reasonable grounds shown. This is the same evidentiary requirement of Rule 47, covering the submission of an indictment by the Prosecutor.

27. *Prosecutor v. Ivica Rajic*, Case No. IT-95-12-R16.

ments and thus would not need to address the involvement of outside States.

The Appeals Chamber's decision directs the Trial Chamber to look to Article 2 first if it is charged, suggesting that if internationality is to be an issue, it should be charged under Article 2. If the Trial Chamber finds Article 2 not applicable, only then does Article 3 become operative. Thus, if the Prosecutor chooses to ignore the possible involvement of foreign States in armed conflicts in the former Yugoslavia, she could charge under Article 3. Conversely, if she decides to raise the issue of outside involvement, Article 2 would be alleged as a jurisdictional base. In the alternative, a Prosecutor may decide, for whatever reasons unknown to casual observers, to withdraw Article 2 and rely instead on Article 3, thereby removing the issue of outside State involvement. Such vagaries would be removed from consideration if Article 2 were not limited to international conflicts.

3. *The Erdemovic Case*

Beyond the conceptual, our jurisprudence can have direct effect on individual combatants, the very men and women that you may be called upon to advise or judge in the future. For example, late last year, the Appeals Chamber handed down a judgement on the appeal lodged by Drazen Erdemovic against his sentence of ten years imprisonment after he entered a plea of guilty for crimes against humanity. He had participated in the execution of approximately 1200 unarmed civilian men in a town in eastern Bosnia. The primary issues with which both the Trial Chamber and Appeals Chamber dealt concerned: (1) the pre-conditions that must be satisfied before a plea of guilty can be accepted as valid and (2) whether duress affords a complete defense to a soldier who has killed innocent human beings.

The Trial Chamber found that the plea was made voluntarily and in full cognisance of the nature of the charge and its consequences. In order to determine whether or not the plea was ambiguous or equivocal, the Trial Chamber looked at how the accused explained his conduct, and whether such an explanation would mitigate the penalty. In fact, the Trial Chamber noted that depending on the probative value of such an explanation, it "may also be regarded as a defense for the criminal conduct which might go so far as to eliminate the *mens rea* of the offence and therefore the offence itself."²⁸ Mr. Erdemovic claimed that he had an obligation to obey the orders of his military superior and asserted that he acted under physical and moral duress. The duress, he claimed, stemmed from his fear for his

own life—he testified that had he refused, he would have been killed together with the victims. They told him, “If you do not wish to do it, stand in line with the rest of them and give others your rifle so that they can shoot you.”²⁹ Further, he feared that if he did not obey those orders, the lives of his wife and child would be in jeopardy. The Trial Chamber found that the duty of the accused, in this particular situation, was to disobey rather than obey and held that “the defense of duress accompanying the superior order will . . . be taken into account at the same time as other factors in the consideration of mitigating circumstances.”³⁰

The Appeals Chamber rendered four separate opinions in the *Erdevovic* case. The majority of the Appeals Chamber established three preconditions that must be satisfied before a guilty plea can be accepted as valid: the plea must be voluntary, informed, and unequivocal. All five judges agreed that the plea was voluntary. Four judges agreed that the plea was not informed because the accused did not understand the difference between pleading guilty to the more serious charge of crimes against humanity rather than war crimes. On the question of whether the plea was equivocal, it was the status of duress—whether it affords a complete defense or whether it should be used only for mitigation purposes—which was the most contentious issue for the judges.

The majority found that duress was not a complete defense and therefore concluded that the plea was not equivocal. The majority rejected the finding of the Trial Chamber that there is a customary rule that allows duress to be pleaded as a complete defense to murder. To the contrary, the majority found that there is no customary international rule at all that can be discerned on the question of duress as a defense to the killing of innocent people. Duress is generally recognized as a complete defense to murder in civil law jurisdictions, while common law jurisdictions typically reject duress as a complete defense to murder. Given the absence of any customary rule on the question of duress as a defense to murder in international law, the majority looked to the “general principles of law recognized by civilized nations” established as a source of international law under Article 38(1)(c) of the International Court of Justice Statute. The majority was satisfied that only a general principle of duress can be gleaned from the surveyed jurisdictions. That principle is that a person is less blamewor-

28. Sentencing Judgment, Case. No. IT-96-22-T, para. 14 (29 Nov. 1996) [hereinafter Sentencing Judgement].

29. Prosecutor v. Drazen Erdemovic, Transcript of Proceedings, 20 Nov. 1996, at 0828-29.

30. Sentencing Judgment, *supra* note 28, para. 20.

thy and less deserving of full punishment when he performs a certain prohibited act under duress. However, because of the irreconcilable differences between the rules regarding duress in the various legal systems of the world, the majority employed the general principle to derive a legal rule applicable to the facts of this particular case. They held that "duress cannot afford a complete defense to a soldier charged with crimes against humanity or war crimes in international law involving the taking of innocent lives."³¹

In rejecting duress as a complete defense, the majority took into consideration several factors. First, in national systems, the primary rationale behind the rejection of duress as a defense to murder is the potential danger to society. Criminals should not be able to bestow immunity upon their agents by threatening them with violence or death if they refuse to carry out orders. Second, one of the purposes of international humanitarian law is to guide the conduct of combatants and their commanders and to protect the vulnerable and weak in armed conflict situations. Thus, by not allowing duress to be a complete defense, notice is being given "in no uncertain terms that those who kill innocent persons will not be able to take advantage of duress as a defense and thus get away with impunity for their criminal acts in the taking of innocent lives."³² Third, the majority found that one should frame the issue of duress narrowly, taking into consideration the fact that soldiers are in a different position than others in society. Consequently, soldiers should be expected to exercise a greater resistance to threats to their own lives than ordinary civilians. And fourth, in situations in which an offender is subject to duress, justice can be served in other ways than by allowing duress to act as a complete defense to murder. Mitigation of punishment is a flexible tool that can be used on a case by case basis and one that comports with the general principle that an individual is less blameworthy and less deserving of full punishment when he acts criminally under duress.

In order for law to have effect, it must be rooted in reality. The judges who dissented on this issue would accept duress as a complete defense if a refusal of a soldier to kill innocents would have a tangible effect on whether lives would be lost. In one opinion it was stated, "Law is based on what society can reasonably expect of its members."³³ In this view, if

31. Joint Separate Opinion of Judge McDonald and Judge Vohrah, Case No. IT-96-22-A, para. 88 (7 Oct. 1997) [hereinafter McDonald/Vohrah Opinion].

32. *Id.* para. 80.

33. Separate and Dissenting Opinion of Judge Cassese, Case No. IT-96-22-A, para. 47 (7 Oct. 1997).

a soldier's refusal would not make a difference to the killing of civilians, we should not require that such a soldier become a martyr by giving up his own life. The majority opinion finds, however, that it is "equally unrealistic to expect a reasonable person to sacrifice his own life or the lives of loved ones in a duress situation even if by this sacrifice, the lives of victims would be saved."³⁴ Is it also not unrealistic to assume that a reasonable person would sacrifice his own life if it would only save the life of a single other person? The dissenting judges' view is grounded on a single-minded assumption of how a reasonable soldier would act in such a situation. The majority further stated, "[e]ither duress should be admitted as a defense to killing innocent persons generally based upon an objective test of how the ordinary person would have acted in the same circumstances or not admitted as a defense to murder at all."³⁵ We should reject this "half-way house which contributes nothing to clarity in international humanitarian law."³⁶

Unable to accept the minority's view of how "a reasonable person" should behave, the majority founded its decision on an "absolute moral postulate" for the implementation of international humanitarian law. We should recall that the Geneva principles were designed to protect non-combatants. If 1200 unarmed civilians are to be considered as prey for soldiers because of an assertion that the soldier's life would be lost to no avail, as a practical matter, such claims of duress would not be infrequent. There would also be no guard against the commission of unspeakable atrocities. That the majority reached this decision should not surprise you since Rule 916 (h) of the *Manual for Courts-Martial* clearly provides that duress is a defense "to any offence except killing an innocent person." Furthermore, since the 1890s, it has been established in the common law of the United States that duress is not a defense to murder in the first degree. Although the majority recognized that the Model Penal Code of the United States, adopted by a few states, views duress as a complete defense to murder, we should recall the context in which we are called to judge criminal culpability. If the Tribunal is to discharge effectively its mandate by ascribing criminal responsibility for serious violations of international humanitarian law rather than ordinary crimes, then the moral imperative must coincide with our purpose.

It is the reality of war, undoubtedly, that soldiers are called upon to act while under duress from superiors, especially when the combatants are

34. McDonald/Vohrah Opinion, *supra* note 31, para. 83.

35. *Id.*

36. *Id.*

members of unstructured forces or paramilitary groups. Will our decisions as judges at the Hague Tribunal change such soldiers' responses to duress conditions? The answer is that our judgment concerning duress may not; nevertheless, an international tribunal has an obligation to recognize the highest standards of international humanitarian law and develop a normative framework that reflects the purposes of Geneva law and incorporates the moral essence of a humane and just society.

IV. The Tribunals and Recent Events

It is often said that "unconscionable atrocities act as the necessary catalyst for constructive action by the world community."³⁷ The establishment of the ICTY and ICTR is testimony to the truth of that view. Moreover, the Tribunals' success has itself been a contributing factor to a series of recent developments that may signal an increased emphasis on enforcement of norms governing the conduct of warfare. In addition to the first national prosecutions under the grave breaches provisions of the Geneva Conventions, the experience of the ICTY and ICTR has also renewed efforts towards the establishment of a permanent International Criminal Court (ICC). Indeed, our practical experience will be of immense value to the ICC as it begins its work. This summer, a diplomatic conference will convene in Rome for the purpose of reaching agreement on a treaty to establish a permanent ICC. Even after the drafting of a statute by the International Law Commission in 1994 and several meetings of ad hoc committees and the preparatory committee, several important issues remain unresolved. However, a consensus appears to be developing on many issues. It appears that the prosecutor will not be inextricably linked to the Security Council's decision-making process regarding prosecutions. The subject-matter jurisdiction may be limited to genocide, crimes against humanity and war crimes, and possibly aggression. The remaining and perhaps the most important issue is that of State cooperation. In other words, what type of enforcement mechanisms will be available to ensure that States comply with the Court's decisions? Without such mechanisms, the Court will not be able to surmount the problems that the ad hoc Tribunals have faced in this regard.

37. VIRGINIA MORRIS & MICHAEL P. SCHARF, *AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 254 (1995).

V. Conclusion

As war itself has changed, the laws of war should follow. Yet, because the international community has clung passionately, politically, to the immovable rock of State sovereignty that keeps alive and keeps dominant archaic perceptions of warfare, the pace of the law has been far slower than the pace of the war. Where before we chiseled at the rock, the ICTY is a drill, the ICC a wrecking ball. For us to use these tools effectively to ensure that the protections afforded to individuals caught in conflicts will actually protect them, we must remain aware of these developments and their implications. We must apply legal principles which are not devoid of morality and of common sense. We must understand the evolutionary history of war and strive to ensure that the rules governing its conduct address those realities.

KIMMEL, SHORT, MCVAY: CASE STUDIES IN EXECUTIVE AUTHORITY, LAW AND THE INDIVIDUAL RIGHTS OF MILITARY COMMANDERS

COMMANDER ROGER D. SCOTT¹

I. Introduction

Two sets of controversial personnel actions frame U.S. involvement in the Second World War: the relief from command of Admiral Husband E. Kimmel and Lieutenant General Walter C. Short at Pearl Harbor, and the court-martial of Captain Charles B. McVay III, Commanding Officer of U.S.S. *Indianapolis*, sunk by a Japanese submarine in July 1945. Vigorous controversy concerning the treatment of these commanders has continued to this day.

Kimmel and Short were the senior Navy and Army commanders at Pearl Harbor at the time of the Japanese attack on 7 December 1941. The Secretaries of the War and Navy Departments relieved both commanders within days of the attack. The relieved commanders reverted, by operation of law, to their regular grades of Rear Admiral and Major General. After reviewing a preliminary report on the damage at Pearl Harbor, prepared by Secretary of the Navy Frank Knox, President Roosevelt appointed an investigative commission headed by Justice Owen Roberts of the U.S. Supreme Court. The Roberts Commission found the senior Navy and Army commanders at Pearl Harbor culpable for the lack of preparedness of forces assigned to them through their failure to coordinate appropriately with each other in the defense of Pearl Harbor. Extensive correspondence and debate on the propriety of courts-martial followed. Both Kimmel and

1. Judge Advocate General's Corps, United States Navy. Presently assigned as Assistant Legal Adviser (Civil Law), U.S. European Command. LL.M., 1994, University of Virginia School of Law; J.D., 1986, University of Virginia School of Law (Order of the Coif, Law Review); M.A., 1997, Naval War College (Highest Distinction); B.A., 1977, Mary Washington College. Formerly assigned as Head, Operational Law Department, International and Operational Law Division, Office of the Judge Advocate General, Department of the Navy (1994-96); Chief, International and Operational Law, Office of the Staff Judge Advocate, U. S. Special Operations Command (1990-93); Staff Judge Advocate, Cruiser-Destroyer Group TWO (1988-90); Attorney-Adviser, Naval Legal Service Office Charleston (1986-88); Law Education Program (1983-86); Supply Department Head, USS Philadelphia (SSN 690). Commander Scott may be contacted at HQ USEUCOM, Unit 30400, Box 1000, APO AE 09128, or by email at scottr@hq.eucom.mil.

Short retired voluntarily in 1942, in their regular grades of Rear Admiral and Major General. A Navy Court of Inquiry and an Army investigative board recommended against court-martial charges, but endorsements of the service secretaries on these investigations continued to find fault with the judgment of Kimmel and Short. Kimmel agitated for a court-martial, which Secretary Forrestal finally offered him, but Kimmel then declined it upon advice of counsel. A congressional investigation into Pearl Harbor conducted after the war, the record of which fills forty bound volumes, failed to vindicate Kimmel and Short; rather, it found Kimmel and Short culpable for multiple grave errors of judgment, including failure to use resources at their disposal effectively, and failure to coordinate with each other in their respective capacities.

Laws passed in 1947 and 1948 provided for advancement of certain officers on the retired list. Rear Admiral Kimmel and Major General Short were eligible for such advancement, but neither officer received the necessary endorsements. Advocates for Kimmel and Short point to failures in Washington as contributory to the defeat at Pearl Harbor, and assert that failure to reveal and punish these failures entitles Kimmel and Short to posthumous advancement to their temporary grades of Admiral and Lieutenant General as a remedy for government discrimination against them.

Captain Charles B. McVay III was Commanding Officer of U.S.S. *Indianapolis* on 30 July 1945, when a Japanese submarine sank her, causing great loss of life. After delivering atomic bomb components from San Francisco to Tinian, *Indianapolis* sailed from Guam for Leyte, Philippines, on 28 July 1945. The intelligence provided to *Indianapolis* before her departure included reports of three possible submarine detections along her route. In transit, *Indianapolis* received a series of additional messages and monitored live radio traffic indicating real-time interdiction of a Japanese submarine along the route to Leyte. Fleet doctrine required ships to employ anti-submarine evasive maneuvering (zigzagging) in submarine waters during good visibility. On the evening of 29 July, at a time when visibility was poor, Captain McVay told the Officer of the Deck that he could cease zigzagging at twilight. The ship ceased zigzagging at approximately 2000, but visibility improved later that night and *Indianapolis* did not resume zigzagging. Struck by at least two torpedoes near midnight, *Indianapolis* sank within fifteen minutes. Approximately 400 men went down with the ship, and 800 escaped into the water. Over the next four

days, adrift on the ocean, 480 of the survivors were preyed upon by sharks or succumbed to their wounds or the elements.

The Commander in Chief, Pacific Fleet, Admiral Nimitz, convened a Court of Inquiry, which recommended the referral of charges against Captain McVay. The Chief of Naval Operations, Admiral King, concurred. After additional investigation and advice, the Secretary of the Navy referred charges for negligently hazarding a vessel (failure to zigzag) and dereliction of duty (delay in ordering abandon ship). A court-martial conducted at the Washington Navy Yard convicted Captain McVay of hazarding a vessel, and acquitted him of the dereliction charge. Consistent with the court-martial recommendation of clemency, Secretary Forrestal set aside all punishment. Captain McVay continued to serve on active duty until he retired as a Rear Admiral in 1949.

Controversy over Captain McVay's court-martial has also continued to this day. His son and numerous supporters have actively sought expungement of the court-martial conviction. Several congressmen have requested that the Navy reconsider the matter. Several books have accused the Navy of a "cover-up," using Captain McVay as a scapegoat. Orion Pictures recently purchased the rights to make a motion picture of Dan Kurzman's book on the *Indianapolis* tragedy, *Fatal Voyage*.

Many recent books and articles have intensified debate over the Pearl Harbor cases and the McVay case. Professional interest in these cases among senior officials, civilian and military, continues unabated. At stake are fundamental legal principles, many of them founded in the Constitution and in Supreme Court precedents concerning the discretionary authority of the service secretaries and the Commander in Chief. The Pearl Harbor cases and the McVay case provide excellent opportunities to delineate the contours of the enduring constitutional principles of civilian control of the military, the separation of congressional, executive, and judicial powers relating to military personnel actions, and the attenuation of individual rights in the military.

Key decisions of the President and the Secretaries of War and the Navy in the cases of Kimmel, Short and McVay were within the scope of Executive authority under the U.S. Constitution. Specific administrative and disciplinary actions taken against these military commanders complied fully with applicable substantive and procedural law. The President retains power to grant the relief sought by advocates for Kimmel, Short and McVay; however, those who advocate official action by the United

States to rehabilitate these World War II era commanders should recast their arguments as petitions for discretionary relief instead of claims of entitlement to remedies based on alleged violations of legal rights.

A. Overview of The Commander in Chief's Powers

The Kimmel, Short and McVay cases raise questions about the relationship between Executive authority and the individual rights of military officers. The law applicable to the grievances alleged in these cases has generally resolved conflict between the authority of the President and individual interests in favor of the President, holding that the individual rights of service members are attenuated in a relationship of subordination to authority. This article explores in detail numerous separate questions of rights and authority raised by the Kimmel, Short and McVay cases, but certain overarching principles warrant clarification at the outset.

Among the characteristics of executive power that distinguish it from legislative and judicial functions are unity of action, energy, dispatch.² To preserve these values the Constitution vests all executive authority in one individual, the President.³ In the exercise of executive power the President competes with no other Executive Branch officer. In his role as Commander in Chief of the armed forces,⁴ the President acts in his most constitutionally defining capacity⁵ and the exclusivity of his powers is at its height.⁶ As Commander in Chief, the President is not merely a policy maker; he enjoys the power of actual command of the armed forces, as "first General and Admiral."⁷ At his option, regardless of his experience or skills, the President may assume direct, personal command of forces in the field or at sea.⁸

The President does not issue commands to ships and aircraft. If the power of command has any meaning, the President must have authority of command over individual military persons. "The military" is not some monolithic institutional organ of the Executive Branch; its effectiveness in executing the will of the Commander in Chief is the collective consequence of individual obedience of command authority. Claims of individ-

2. *E.g.*, THE FEDERALIST No. 70 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 722-27 (reprint 1987) (1833).

3. U.S. CONST. art. 2, § 1 ("The executive Power shall be vested in a President of the United States of America.").

4. *Id.* art. 2, § 2 ("The President shall be Commander in Chief of the Army and Navy of the United States . . .").

ual exemption from the Commander in Chief's authority on the basis of perceived individual rights or subjective values set up a constitutional conflict between the President's power, which may only be exercised through subordinate people, and the constellation of individual rights enshrined in

5. See THE FEDERALIST No. 74, at 500 (Alexander Hamilton) (Jacob E. Cooke ed., 1961):

Of all the cares and concerns of government, the direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. The direction of war implies the direction of common strength; and the power of directing and employing the common strength, forms an usual and essential part of the definition of executive authority.

See also STORY, *supra* note 2, § 768:

[T]he direction of war most peculiarly demands those qualities which distinguish the exercise of power by a single hand. Unity of plan, promptitude, activity, and decision, are indispensable to success; and these can scarcely exist, except when a single magistrate is entrusted exclusively with the power. Even the coupling of the authority of an executive council with him, in the exercise of such powers, enfeebles the system, divides the responsibility, and not unfrequently defeats every energetic measure. Timidity, indecision, obstinacy, and pride of opinion, must mingle in all such councils, and infuse a torpor and sluggishness, destructive of all military operations.

6. *E.g.*, Department of the Navy v. Egan, 484 U.S. 518, 530 (1988) ("[C]ourts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."); Nordman v. Woodring, 28 F. Supp. 573, 576 (W.D. Okla. 1939) (Under the Commander in Chief Clause the President has "power to employ the Army and the Navy in a manner which he may deem most effectual."); GLENDON A. SCHUBERT, JR., THE PRESIDENCY IN THE COURTS 348 (1957) ("When the President acts, literally, as Commander in Chief, his constitutional authority is on unimpeachable grounds."); CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 117 (1921) ("[P]ractically all authorities agree that the President, as Commander-in-Chief, occupies an entirely independent position, having powers that are exclusively his, subject to no restriction or control by either the legislative or judicial departments.").

7. THE FEDERALIST No. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (The Constitution vests in the President "supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy.").

8. THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 453 (1996) (President exercises supreme military command personally and directly); HAROLD F. BASS, JR., ET AL., POWERS OF THE PRESIDENCY 156-57 (1989); WARREN W. HASSLER, JR., THE PRESIDENT AS COMMANDER IN CHIEF 7-8 (1971) (The Framers believed the Commander in Chief could, "if he wished, assume personal command of troops in the field or of warships on the water."); LOUIS SMITH, AMERICAN DEMOCRACY AND MILITARY POWER 47 (1951); HORACE CAMPBELL, AN INTRODUCTION TO MILITARY LAW 21 (1946) (President may assume military command in the field); BERDAHL, *supra* note 6, at 119 (Proposals at the Constitutional Convention to restrict the President's power to exercise "actual command in the field" were specifically rejected.).

the Constitution. In cases of conflict, a delicate balance that affects the safety of the nation must be struck between the two. The courts have resolved this conflict overwhelmingly within the paradigm of presidential authority, and not within the more familiar paradigm of individual rights that may be vindicated through litigation.

Professor Louis Henkin, a prominent scholar of executive powers, has interpreted Supreme Court deference to the executive in foreign affairs cases as reflecting "a determination that the Executive Branch was acting within its authority and hence its actions were 'law for the courts.'"⁹ In essence, when the President exercises discretion within the core of his constitutional authority as a separately empowered branch of government, his act is the law. The President's Commander in Chief power is even more clearly committed to him uniquely under the Constitution than his foreign affairs powers. Accordingly, the President's exercise of unique military command functions, including inexorably the command of individual military people, should also be considered "law in action." If the President can command the supreme sacrifice of soldiers and seamen in combat,¹⁰ how can it be said that his Commander in Chief power is limited by the potential for embarrassment of disappointed flag and general officers?

The President exercises the Commander in Chief power through control of individuals. He appoints all military officers¹¹—a discretionary power not subject to revision or compulsion by any other authority.¹² No act of Congress or even of the President can create a military officer or group of officers not subordinate to the President; the President may scrutinize the performance of his military subordinates and remove any of them at will.¹³ Objective standards of merit or justice do not impose limits

9. Gabriel W. Gorenstein, *Judicial Review of Constitutional Claims Against the Military*, 84 COLUM. L. REV. 387, 418-19 (1984) (citing Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597, 612 (1976)).

10. See, e.g., Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 WAKE FOREST L. REV. 557, 558 (1994).

11. E.g., BASS, *supra* note 8, at 167 (Presidents exercise control over the military through their appointments of military officers).

12. Congress may not compel the President to appoint, commission or promote particular individuals. See, e.g., 31 Op. Att'y Gen. 80 (1916); 30 Op. Att'y Gen. 177 (1913); 29 Op. Att'y Gen. 254 (1911); BERDAHL, *supra* note 6, at 127 ("Congress can in no way dictate what appointment shall be made . . ."). An unenacted bill sponsored by Congressman Rarick in the House of Representatives on behalf of Rear Admiral Kimmel in 1968 (H.R. 18058, 99th Cong., 2d Sess. (1968)) evidenced an appreciation of the President's appointment power by requesting the President "to advance posthumously the late Rear Admiral Husband E. Kimmel . . ."

on such discretionary decisions. The President may exercise command authority guided by his own purely subjective inclinations, or by selfish political considerations. In most administrative personnel matters affecting officers, the President has always been the final arbiter.¹⁴ The fact that President Roosevelt exercised the powers of Commander in Chief more vigorously than most presidents¹⁵ does not affect the fundamental lawfulness of administrative actions taken under his aegis with respect to Kimmel and Short.

Because it would be physically impossible for the President to exercise all executive power personally, the courts have long recognized that the constitutional authority of the President is also expressed in the official acts of the service secretaries, "without containing express reference to the direction of the President."¹⁶ Whether specifically directed by the President or not, actions taken in the Kimmel, Short and McVay cases by Secretary Knox, Secretary Forrestal, Secretary Stimson, and their successors, bear the authority of the Commander in Chief, and enjoy all the freedom of action accorded the President himself.¹⁷ Placement of the Commander in Chief power in the President and his appointed civilian deputies is not simply strategically appropriate to ensure the preeminence of rational policy in military affairs,¹⁸ it is also an important constitutional guarantor of

13. See, e.g., 7 Op. Att'y Gen. 453, 464-65 (1855). The President's authority over individual officers and groups of officers has been tested and proven in recent history. E.g., David McCullough, *Truman Fires MacArthur*, MIL. HIST. Q., Autumn 1992, at 8; see also R. GORDON HOAXIE, *COMMAND DECISIONS AND THE PRESIDENCY* 155-68 (1977), which discusses the "Revolt of the Admirals," a reaction to competition between carrier aviation and the B-36. "In the interest of national security" top naval officers sought to undermine the political resource allocation process to avert what they saw as the "emasculatation of the Navy." Secretary of the Navy Matthews effected, with Truman's approval, the relief of the Chief of Naval Operations and other senior officers. He forced other officers to retire and in one case revoked a temporary appointment, causing a flag officer to revert to his lower, regular grade.

14. See SCHUBERT, *supra* note 6, at 179-80 ("As the Commander in Chief, the President has from the beginnings of our government functioned as the highest court of appeals for those subject to military law.").

15. E.g., William R. Emerson, *F.D.R. (1941-45)*, in *THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF* 149 (Ernest R. May ed., 1960) [hereinafter *THE ULTIMATE DECISION*] ("Roosevelt was the real and not merely a nominal commander-in-chief of the armed forces. Every president has possessed the constitutional authority which that title indicates, but few presidents have shared Mr. Roosevelt's readiness to exercise it in fact and in detail and with such determination . . .").

16. 7 Op. Att'y Gen. 453 (1855).

civilian control of the military,¹⁹ a fundamental principle in the Founders' domestic political philosophy.²⁰

B. The Military Milieu

"The essence of military service is the subordination of the desires and interests of the individual to the needs of the service."²¹ One need not serve long in the armed forces to realize that authority and the discretion of one's superiors pervade the environment. Military personnel decisions

17. See *United States v. Fletcher*, 148 U.S. 84, 88-90 (1892) (Presidential authority presumed in disciplinary action by Secretary of War); *United States v. Eliason*, 41 U.S. (2 How.) 291, 302 (1842) ("The Secretary of War is the regular constitutional organ of the President for the administration of the military establishment of the nation . . ."); *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 513 (1839) (presumption that official acts of department heads bear the authority of the President); *Seltzer v. United States*, 98 Ct. Cl. 554, 559-62 (1943) (Secretary of War acts with authority of the President, including the dismissal of officers); *McElrath v. United States*, 12 Ct. Cl. 201 (1876) (Order issued by the Secretary of the Navy dismissing a naval officer was, in view of the law, the act of the President, without requirement that such order cite authority of the President.); 17 Op. Att'y Gen. 13 (1881); 7 Op. Att'y Gen. 453 (1855) (survey of judicial and historical precedents); 1 Op. Att'y Gen. 380 (1820) (Orders issued by the Secretaries of War and the Navy "are, in contemplation of law, not their orders, but the orders of the President."); *PRESIDENTIAL POWER AND THE CONSTITUTION*, ESSAYS BY EDWARD S. CORWIN 86 (Richard Loss ed., 1976) [hereinafter *CORWIN ESSAYS*]; SMITH, *supra* note 8, at 105 (The civilian departmental secretary is the "deputy of the duly elected political head of state, . . . an outpost of the Chief Executive and a representative of the political party whose policies he is to pursue." (emphasis added)); MILTON C. JACOBS, *OUTLINE OF MILITARY LAW: UNITED STATES SUPREME COURT DECISIONS 37-38* (1948); BERDAHL, *supra* note 6, at 21.

18. See, e.g., MICHAEL I. HANDEL, *MASTERS OF WAR: CLASSICAL STRATEGIC THOUGHT* 49-52 (1992) (theory of Clausewitz and Sun Tzu).

19. E.g., *Greer v. Spock*, 424 U.S. 828, 845-46 (1976) (Powell, J., concurring) ("Command of the armed forces placed in the political head of state, elected by the people, assures civilian control of the military. Few concepts in our history have remained as free from challenge as this one."); *Parker v. Levy*, 417 U.S. 733, 751 (1974) ("The military establishment is subject to the control of the civilian Commander in Chief and the civilian department heads under him, and its function is to carry out the policies made by those civilian superiors."); 10 Op. Att'y Gen. 74 (1861) ("[W]hatever skillful soldier may lead our armies to victory against a foreign foe, or may quell a domestic insurrection; however high he may raise his professional renown, and whatever martial glory he may win, still he is subject to the orders of the civil magistrate."); BASS, *supra* note 8, at 156 (1989) (By making the President the Commander in Chief, "the Framers attempted to ensure that civilian authority would always direct the armed forces."); HASSLER, *supra* note 8, at 13 (The President's "control over . . . military chiefs is complete. Indeed if he lacked this power, civil control of the military would be impossible."); SMITH, *supra* note 8, at 47 ("By the plain intent of the constitution, every member of the military organization, whether it be the civilian secretary or the professional commander, is fully subject to his authority. If the President lacked this power, civil control would scarcely be possible . . .").

that determine the course of one's service career and reach into the far corners of personal life are largely unappealable. The law applicable to such decisions is fundamentally different from law applicable in the civilian setting. In numerous decisions the Supreme Court has explained the rationale for upholding standards in the military context that differ from standards applicable to civilians. The following samples from Supreme Court pronouncements on this issue make the point clearly enough: "[N]o military organization can function without strict discipline and regulation that would be unacceptable in a civilian setting."²² "[M]ilitary necessity makes demands on its personnel 'without counterpart in civilian life.'"²³ "The Court has often noted the peculiar and special relationship of the soldier to his superiors . . .,"²⁴ and has acknowledged that "the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty"²⁵ "Centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns."²⁶ "The military constitutes a specialized community governed by a separate discipline from that of the civilian."²⁷ In *Parker v. Levy*, Justice Rehnquist, writing for the Court, stated:

This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society. We have also recognized that the military has, again by necessity, developed laws and traditions of its own during its long history. The differences between military and civilian communities result

20. *E.g.*, *Gilligan v. Morgan*, 413 U.S. 1, 10-11 (1973) ("It is this power of oversight and control of military forces by elected representatives and officials which underlies our entire constitutional system."); *Duncan v. Kahanamoku*, 327 U.S. 304, 325 (1946) ("The supremacy of the civil over the military is one of our great heritages Our duty is to give effect to that heritage at all times, that it may be handed down untarnished to future generations"); MAURICE MATLOFF, ET AL., *AMERICAN MILITARY HISTORY* 16 (1985) (describing the principle of civilian control as "a fundamental safeguard"); FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 202-03 (1985); EDMOND CHAN, *THE GREAT RIGHTS* 95 (1963) (quoting Chief Justice Earl Warren: "[T]he axiom of subordination of the military to the civil . . . is so deeply rooted in our national experience that it must be regarded as an essential constituent of the fabric of our political life."); GEORGE F. MILTON, *THE USE OF PRESIDENTIAL POWER* 112 (reprint 1965) (1944).

21. *Orloff v. Willoughby*, 345 U.S. 83, 92 (1953).

22. *Chappell v. Wallace*, 462 U.S. 296, 300 (1983).

23. *Id.* at 300 (quoting *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975)).

24. *Id.* (quoting *United States v. Brown*, 248 U.S. 110, 112 (1957)).

25. *Id.* (quoting *Burns v. Wilson*, 346 U.S. 137, 140 (1953)).

26. *Id.*

27. *Orloff*, 345 U.S. at 94.

from the fact that it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be left open as to the right to command in the officer, or the duty of obedience in the soldier.²⁸

Such statements by the Court are not merely dictum. In cases where service members have challenged military personnel decisions the courts have shown great deference to command authority, at the expense of claimed individual rights.²⁹ As stated in *Orloff v. Willoughby*,

[F]rom top to bottom of the Army the complaint is often made, and sometimes with justification, that there is discrimination, favoritism, or other objectionable handling of men. But judges are not given the task of running the Army The military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters.³⁰

28. *Parker v. Levy*, 417 U.S. 733, 743 (1974) (citations omitted).

29. *E.g.*, *United States v. Stanley*, 483 U.S. 669 (1987) (In a case involving nonconsensual, experimental administration of LSD, the Court held that service members have no cause of action under the Constitution for injuries suffered incident to service, even if persons not directly in the service member's chain of command inflicted injury.); *Shearer v. United States*, 473 U.S. 52, 58 (1985) ("Courts traditionally have been reluctant to intervene in any matter which 'goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman."); *Chappell v. Wallace*, 462 U.S. 296, 303 (1983) (Military personnel may not sue their superiors for violations of constitutional rights); *Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) ("There are thousands of routine personnel decisions regularly made by the services which are variously held nonjusticiable or beyond the competence or jurisdiction of the court to wrestle with."); *Simmons v. United States*, 406 F.2d 456, 459 (5th Cir.), *cert. denied*, 395 U.S. 982 (1969) ("That this court is not competent or empowered to sit as a super-executive authority to review the decisions of the Executive and Legislative branches of government in regard to the necessity, method of selection, and composition of our defense forces is obvious and needs no further discussion."); *Sanders v. United States*, 219 Ct. Cl. 285, 594 F.2d 804, 813 (1979) (Courts "allow the widest possible latitude to the armed services in their administration of personnel matters.").

30. *Orloff*, 345 U.S. at 93-94.

Central among the unique features of military life is the authority of senior officials in the chain of command to determine the qualifications for command, the suitability of individual officers for assignment to positions of command, and the tenure of service in a position of command.³¹ Military commanders have plenary authority to select or remove subordinate commanders to ensure efficient accomplishment of the military mission. A claim disputing a commander's exercise of the prerogative to shape the command in the manner that is most likely to achieve unit cohesion and effective combat skills is plainly nonjusticiable. Judicial second-guessing of such fundamental command prerogatives as relief and reassignment of subordinate officers "would mean that commanding officers would have to stand prepared to convince a civilian court of a wide range of military . . . decisions,"³² risking the total breakdown of order and discipline. In the military context, administrative personnel decisions are subject to normative, objectively-based principles only when and to the extent that Congress (within its sphere of authority) or senior officials in the chain of command deem the use of such principles appropriate.

The selection of senior officers for key positions of command is both a military and a political decision. The President may base appointment to or removal from a critical position upon any combination of such factors as the experience of the nominee, past performance, seniority, education, specific noteworthy achievements, and such unmeasurable, subjective fac-

31. See *Wood v. United States*, 968 F.2d 738 (8th Cir. 1992) (military decision regarding qualifications for command is nonjusticiable). A striking illustration of the subjective authority of senior officials to determine the qualifications and suitability of individual officers for particular positions in the military is the near-legendary personal interview process by which Admiral Hyman G. Rickover hand-picked officers for the Navy's nuclear power program and positions of responsibility within that program. NORMAN POLMAR & THOMAS B. ALLEN, *RICKOVER* 267-86 (1982). Writing specifically about Rear Admiral Kimmel's selection for the position of Commander in Chief, United States Fleet (CominCh) and Commander in Chief, Pacific Fleet (CinCPac) over the heads of other more senior officers, the Chief of Naval Personnel responded to an inquiry from Senator Scott Lucas that "[a]ppointments such as that to Commander in Chief of a Fleet . . . are never made solely on a seniority basis but rather on the considered judgments and recommendations of high ranking Naval officials. Their selection is naturally dependent upon numerous factors such as availability, competency, and seniority of the officer in question." Letter from Chief of Naval Personnel to Senator Scott Lucas (27 June 1946) (Pers-191-mjc) [hereinafter *Lucas Letter*]. Copies of all non-public official documents, records and correspondence cited in this article are available in a special Pearl Harbor archive maintained by the Office of the Under Secretary of Defense (Personnel and Readiness) (Officer and Enlisted Performance Management) (USD (P&R) (OEPM)), or from the Office of the Judge Advocate General, Department of the Navy.

32. *Shearer v. United States*, 473 U.S. 52, 58 (1985).

tors as the officer's strategic or tactical "style," personality, the judgment of senior officials about the officer's flexibility or adaptability to different circumstances, whether the officer will "fit in" with others in a particular position or location, what political or public relations impact a certain nomination might have, and simple favoritism. The President's power to select, assign and remove officers in three- and four-star positions is not fundamentally different from the power to select and shuffle cabinet officers, heads of agencies, and other key political appointees within the Executive Branch. The President can remove civilian executive officers as easily as reassigning military officers.³³ The selection of individuals for positions within the Executive Branch is clearly within the President's constitutionally-protected discretion, subject in most cases to the added political dimension of Senate confirmation.

All persons, military and civilian, who occupy high government office by specific personal appointment are exposed to political forces.³⁴ There is no doubt that political forces played some part in the post-Pearl Harbor events surrounding Rear Admiral Kimmel and Major General Short. That professional military officers in high positions of command are exposed to political forces is an ineluctable consequence of their great responsibilities, their public visibility, and the deeply-rooted constitutional principle of civilian control of the military. Proximity to the President in

33. See, e.g., *Myers v. United States*, 272 U.S. 52 (1926) (Presidential prerogative to remove executive officials from office); Steven Breker-Cooper, *The Appointments Clause and the Removal Power: Theory and Seance*, 60 TENN. L. REV. 841, 845 n.14 (1993) ("Power to remove an officer is important because it permits the President to control the performance of that officer."); MARTIN S. SHEFFER, *PRESIDENTIAL POWER* 29-30 (1991) (President's "illimitable power" to remove officers exercising executive authority); EDWARD S. CORWIN, *THE PRESIDENT: OFFICE AND POWERS 1787-1984* 110, 423 (Randall W. Bland et al. eds., 5th ed., 1984); *Id.* at 122-23 (The potential for stigma in the dismissal of an officer by the President does not affect any case in which the President has the constitutional power of dismissal.). The tradition of illimitable Presidential removal power over appointees exercising executive authority is deeply rooted. E.g., James Madison, *Remarks During Debate on Establishing Department of Foreign Affairs*, in 1 ANNALS OF CONG. 515-17 (Joseph Gales ed., 1789) (President's power of removal follows from the Appointments Clause and the Executive Power Clause); 11 DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE-SEPTEMBER 1789, at 883 (Charles Bangs Bickford et al. eds. 1992) (Mr. Ames: "[A]dvantages may result from keeping the power of removal, in terrorem, over the heads of the officers; they will be stimulated to do their duty to the satisfaction of the principal" Mr. Ames considered and rejected as a countervailing consideration that it might be difficult to get "officers of abilities to engage in the service of their country upon such terms."); CORWIN ESSAYS, *supra* note 17, at 98-99 (on the "decision of 1789," a debate in the first Congress resolved in favor of construing the Constitution as empowering the President to dismiss executive officers at will).

34. For example, Secretary of Defense Cheney relieved General Michael Dugan, Chief of Staff of the Air Force, during Desert Shield in the Fall of 1990 without any "due process" hearing. As the press reported, the Secretary relieved General Dugan for outspoken comments during the delicate period when the international coalition for Desert Storm was being forged, and the administration was seeking congressional support for military operations. E.g., Fred Kaplan, *Cheney Fires Air Force Chief of Staff*, B. GLOBE, Sept. 8, 1990, at 1; Janet Cawley, *Air Force Chief Fired Over Remarks*, CHI. TRIB., Sept. 18, 1990, at 1 (Secretary Cheney commented that General Dugan "showed poor judgment at a very sensitive time."). The nomination of Admiral Frank Kelso (Chief of Naval Operations) for retirement in four-star grade was clouded in Senate confirmation proceedings by political debate over the Tailhook incident. E.g., Michael Ross & Karen Tumulty, *Senate to Retire Kelso at 4 Stars, After Fiery Debate*, L.A. TIMES, Apr. 20, 1994, at A1, col. 3. By order of President Truman, Secretary of the Navy Matthews relieved Admiral Louis E. Denfield, Chief of Naval Operations from 1947 to 1949, over a political dispute concerning testimony given by Denfield at a hearing chaired by Congressman Carl Vinson. Denfield learned of his relief from a radio newscast. See Paolo E. Coletta, *Louis Emil Denfield*, in THE CHIEFS OF NAVAL OPERATIONS 202-05 (Robert William Love, Jr., ed. 1980) [hereinafter CHIEFS OF NAVAL OPERATIONS]. In April 1951, based on disagreements over U.S. policy in the Far East, President Truman directed the summary relief and recall of General Douglas MacArthur, insisting that he be fired instead of being allowed to retire, an "unceremonious, peremptory dismissal," setting off a political firestorm. WILLIAM MANCHESTER, *AMERICAN CAESAR* 648-55 (1978); D. CLAYTON JAMES, *COMMAND CRISIS: MACARTHUR AND THE KOREAN WAR* 6 (1982) ("The clash played no small part in killing Truman's chance for another term as President."). MacArthur first learned of his relief through a public radio broadcast. *Id.* at 7. See also Forrest C. Pogue, *Marshall on Civil-Military Relations*, in THE UNITED STATES MILITARY UNDER THE CONSTITUTION OF THE UNITED STATES 202 (Richard H. Kohn ed., 1991) [hereinafter U.S. MILITARY UNDER THE CONSTITUTION] (General Marshall "reluctantly accepted" that politically-based appointments and promotions "were prerogatives of the President."); SHEFFER, *supra* note 33, at viii ("Roosevelt removed duly appointed and confirmed individuals from office without cause for partisan political reasons . . ."); HASSLER, *supra* note 8, at 39 (To silence public opinion critical of the conduct of the War of 1812, during which British forces burned parts of Washington, President James Madison demanded and accepted the resignation of Secretary of War Eustis.); T. HARRY WILLIAMS, *LINCOLN (1861-1865)*, in THE ULTIMATE DECISION, *supra* note 15, at 86 ("Lincoln handed out many commissions at the start of the war for reasons that were completely political . . . , dispens[ing] commissions to ambitious political chieftains." The use of military patronage to give prominent members of many diverse groups a "stake" in the war was a "good investment in national cohesion."); TELFORD TAYLOR, *GRAND INQUEST: THE STORY OF CONGRESSIONAL INVESTIGATIONS* 13-28 (reprint 1974) (1955) (Congress conducted its first investigation in 1792, of a disastrous military defeat under the command of Major General Arthur St. Clair. The whole St. Clair affair became entangled in Federalist/Antifederalist politics and St. Clair "was left accused but unjudged."); T. HARRY WILLIAMS, *LINCOLN AND HIS GENERALS* 323-24 (1952) [hereinafter *LINCOLN AND HIS GENERALS*] (Lincoln stalled on Grant's request to relieve Butler, a political patronage appointee, because Butler was a prominent Democrat and it was an election year—"Grant understood the vital relationship in a democracy between war and politics."). Several books could not exhaust this subject. Failure to anticipate exposure to hard politics at levels in the chain of command only several steps removed from the President is naive bordering on foolish.

the chain of command is proximity to the politics which have always surrounded the Presidency.

The relationship of the President and his civilian deputies to subordinate military officers is characterized not by the rights of officers but by the broad authority of the President. Appointment to flag or general rank, and service in important positions of command, are fragile privileges, not rights. The fragility of such privileges is suggested poignantly by the comment of President Lincoln upon being informed that a brigadier general had been captured with some horses and mules: "I don't care so much for brigadiers;" the President demurred, "I can make them. But horses and mules cost money."³⁵

II. Case Study: The Pearl Harbor Commanders

Family members of Rear Admiral Kimmel and Major General Short, and assorted advocates of their cause, have sought posthumous advancement of the two officers for decades as a species of remedial justice for what they perceive as the scapegoating of Kimmel and Short to shield the Roosevelt administration from blame for the Pearl Harbor disaster.³⁶ This campaign for symbolic apology reached a fevered pitch in recent years, with the approach and passing of the fiftieth anniversary of the Second World War.³⁷ Most recently, Senator Strom Thurmond sponsored a meeting at which advocates for Kimmel and Short aired grievances against the government.³⁸ At this hearing Senator Thurmond extracted from then-Deputy Secretary of Defense John Deutch (facing imminent Senate confirmation hearings on his nomination as Director of Central Intelligence) a promise to conduct a thorough reconsideration of the entire Pearl Harbor dispute and the personnel actions taken with respect to Kimmel and Short. The fulfillment of that promise was the "Dorn Report," prepared by Edwin Dorn, Under Secretary of Defense for Personnel and Readiness (USDPR), accompanied by an extensive "Staff Study."³⁹ The *Dorn Report* and *Staff*

35. T. Harry Williams, *Lincoln (1861-1865)*, in *THE ULTIMATE DECISION*, *supra* note 15, at 85-86; *LINCOLN AND HIS GENERALS*, *supra* note 34, at 10.

36. See, e.g., The "Thirty-six Flag Officer Petition," to President George Bush, at 2 (Oct. 22, 1991) [hereinafter *Flag Officer Petition*] (signed by 32 admirals, three vice-admirals and one rear admiral, including Admirals Thomas Moorer, William Crowe, James Holloway III, Elmo Zumwalt, and Thomas Hayward) ("A partial atonement can be achieved by posthumously promoting these two officers [Kimmel and Short] to the ranks they held at the time of the attack, promotions to which they are entitled by law." (emphasis added)). Whether any officer can be "entitled" to a promotion is discussed *infra* at notes 72-97 and accompanying text.

Study recommended against posthumous advancement, which conclusion the new Deputy Secretary of Defense, John White, endorsed and communicated to Senator Thurmond on 27 December 1995.

The first case study in this article (The Pearl Harbor Commanders) is,

37. The Kimmel campaign has claimed the attention of numerous high-ranking officials who have considered and rejected the appeal for posthumous advancement. *E.g.*, Letter from Deputy Secretary of Defense White to Senator Strom Thurmond (Dec. 27, 1995); Letter from President Clinton to Manning Kimmel IV (Dec. 1, 1994) ("I agree with the judgment of prior investigatory commissions."); Letter from Secretary of Defense Perry to Edward Kimmel (Nov. 22, 1994); Letter from Secretary of Defense Perry to Edward Kimmel (Sept. 7, 1994); Letter from Chief of Legislative Affairs (Bowman), to House Armed Services Committee Chairman, Ronald Dellums (Aug. 23, 1993); Letter from Chief of Naval Operations, Admiral Kelso, to Edward Kimmel (July 1, 1993); Letter from the Military Assistant to President Bush (Trefry), to Edward Kimmel (Nov. 19, 1991) ("A possible posthumous promotion of Admiral Kimmel has been considered within the Department of Defense numerous times in the past and the suggestion has been rejected in each instance."); Letter from Under Secretary of the Navy, (Howard) to Edward Kimmel (Aug. 21, 1991); Letter from Secretary of the Navy, (Garrett) to Senator Joseph Biden (Mar. 19, 1991); Letter from Assistant Vice Chief of Naval Operations to Senator Pete Wilson (Sept. 12, 1990); Letter from Secretary of Defense Cheney to Senator William Roth (June 13, 1990); Letter from Secretary of Defense Cheney to Jackie Montgomery (Oct. 23, 1989); Letter from Deputy Secretary of Defense Taft to the Secretary of the Navy (Jan. 19, 1989) (declining to forward the Kimmel issue to the President). Senior officials have also rejected numerous efforts on behalf of Major General Short. *See* Letter from Deputy Secretary of Defense White to Senator Strom Thurmond (Dec. 27, 1995); Memorandum, Secretary of the Army, Togo West, to Under Secretary of Defense for Personnel and Readiness (30 Nov. 1995); Letter from Secretary of the Army Stone to Senator Pete Domenici (Sept. 2, 1992); Memorandum, Deputy Assistant Secretary of the Army, Mr. Matthews, SAMR-RB (Dec. 19, 1991) (officially denying the Army Board for Correction of Military Records petition to advance Major General Short). The Kimmel campaign peaked before the fiftieth anniversary of the attack on Pearl Harbor when President Bush declined to "reverse the course of history" by nominating Rear Admiral Kimmel for posthumous advancement in time for Pearl Harbor Day ceremonies. *See Pearl Harbor Admiral's Sons Fighting to Clear His Name*, ATL. J. & CONST., Dec. 8, 1991, at A11.

38. *See* Remarks at Meeting of the Office of the Secretary of Defense and Members of the Kimmel Family Dealing with the Posthumous Restoration of the Rank of Admiral for Rear Admiral Husband E. Kimmel, United States Navy (Apr. 27, 1995) [hereinafter *Thurmond Hearing*] (transcript of informal hearing conducted by Senator Thurmond, transcribed by L.B.S., Inc.), available at <<http://www.erols.com/nbeach/kimmel.html>>.

39. Memorandum, Under Secretary of Defense for Personnel and Readiness, to Deputy Secretary of Defense, subject: Advancement of Rear Admiral Kimmel and Major General Short (15 Dec. 1995) [hereinafter *Dorn Report*]; Staff Study, Advancement of Rear Admiral Kimmel and Major General Short on the Retired List (1 Dec. 1995) (prepared under the supervision of Nicholai Timenes, Assistant to USD (P&R) (MPP)) [hereinafter *Dorn Staff Study*]. Both documents are available at <<http://www.sperry-marine.com:80/pearl/dorn.htm>>.

in part, an elaboration of the author's work as a member of the ad hoc task force that supported the USDPR *Staff Study*. The focus of this first case study is to answer long-standing claims that various personnel actions taken with respect to Rear Admiral Kimmel and Major General Short were legally deficient. As demonstrated herein, such claims are without merit.

A. Relief of Command

On 1 February 1941, Rear Admiral Husband E. Kimmel relieved Admiral J. O. Richardson as Commander in Chief, Pacific Fleet and Commander in Chief, United States Fleet.⁴⁰ Solely as an incident of assuming this position of command, Rear Admiral Kimmel also assumed the temporary rank of Admiral.⁴¹ On 7 February 1941, Major General Walter C. Short assumed duty as Commander, Hawaiian Department, and with it the temporary rank of Lieutenant General.⁴² At the time, the highest regular or "permanent" grade that officers of the armed forces could hold was Rear Admiral or Major General (O-8).⁴³

Before relieving Richardson, Kimmel had served at Pearl Harbor as Commander Cruisers, Battle Force, with additional duty as Commander, Cruiser Division Nine.⁴⁴ He had been commissioned as a regular Rear Admiral since 1 November 1937, and was junior to a number of other permanent rear admirals the President might have chosen as Richardson's relief.⁴⁵ The President had obviously cut short Richardson's tour of duty. Kimmel subsequently learned that the President had directed the early relief of Richardson due to a disagreement over retention of the Pacific

40. See Letter from President Franklin D. Roosevelt to Rear Admiral Husband E. Kimmel (Jan. 7, 1941):

In accordance with the provisions of an Act of Congress approved May 22, 1917, you are hereby designated as Commander in Chief, Pacific Fleet, with additional duty as Commander in Chief, United States Fleet, with the rank of admiral, effective on the date of your taking over the command of the Pacific Fleet. In accordance with this designation you will assume the rank and hoist the flag of admiral on the above mentioned date.

Documents in Rear Admiral Kimmel's service record indicate that he assumed duties as CinCPac and CominCh on 1 February 1941.

41. Then-existing law allowed the President to designate six officers as Commanders of Fleets or subdivisions thereof with the rank of Admiral or Vice Admiral. Act of May 22, 1917, ch. 20, § 18, 40 Stat. 84, 89. Such advancements to the rank of Admiral or Vice Admiral were effective only during the incumbency of the designated flag officer. *Id.* ("when an officer with the rank of admiral or vice admiral is detached from the command of a fleet or subdivision thereof . . . he shall return to his regular rank in the list of officers of the Navy . . .").

Fleet at Pearl Harbor, away from its customary West Coast homeports.⁴⁶ Kimmel knew he had attained this unexpected⁴⁷ assignment, and consequently the rank of Admiral, as the result, in part, to the summary relief of his predecessor at the direction of President Roosevelt.⁴⁸

After the Japanese attack on Pearl Harbor the service secretaries relieved both Kimmel and Short of their commands,⁴⁹ whereupon the commanders reverted, by operation of law, to their regular grades of Rear Admiral and Major General. The following discussion explores the subjective discretion of senior officials in the chain of command to relieve

42. *Hearings Before the Joint Committee on the Investigation of the Pearl Harbor Attack*, 79th Cong., 1st Sess., pt. 7, at 2967 (1946) [hereinafter PHA] (his temporary promotion was effective on 8 February 1941). A fire at the National Personnel Records Center destroyed Major General Short's official service record in 1973. References to personnel actions affecting Major General Short must be made to his official "reconstructed record" or to secondary sources such as exhibits in the PHA record. Major General Short's temporary designation as a Lieutenant General was a consequence of Act of Aug. 5, 1939, ch. 454, 53 Stat. 1214, as amended, Act of July 31, 1940, ch. 647, 54 Stat. 781. The Act of Aug. 5, 1939 provided that "the major generals of the Regular Army specifically assigned by the Secretary of War to command the four armies of the United States Army shall have the rank and title of lieutenant general while so serving." (emphasis added). The Act of July 31, 1940 amended the above-quoted Act "to include the major generals of the Regular Army specifically assigned by the Secretary of War to command the Panama Canal and Hawaiian Departments."

43. This had long been the case. For example, Admiral Charles Frederick Hughes, the Chief of Naval Operations from 1927-30, retired in his permanent grade of Rear Admiral. William R. Braisted, *Charles Frederick Hughes*, in *CHIEFS OF NAVAL OPERATIONS*, *supra* note 34, at 66. Reflecting this tradition until recently, retirement in a higher grade than O-8 required separate nomination by the President and confirmation by the Senate. See *infra* note 274 and accompanying text.

44. Rear Admiral Kimmel held these command positions from 6 April 1939 to 1 February 1941, when he assumed the duties of CinCPac and CominCh.

45. As stated in Lucas Letter, *supra* note 31, when the President designated Rear Admiral Kimmel to relieve Admiral Richardson "there were approximately 16 officers of flag rank who were still on active duty, and were eligible for such a designation, and were ahead of Admiral Kimmel on the seniority list."

46. Husband E. Kimmel, *Admiral Kimmel's Own Story of Pearl Harbor*, U.S. News AND WORLD REP., Dec. 10, 1954, at 69 [hereinafter *Kimmel's Own Story*].

47. PHA (pt. 6), *supra* note 42, at 2498, 2714 ("a complete surprise").

48. *Kimmel's Own Story*, *supra* note 46, at 69 ("His [Admiral Richardson's] summary removal was my first concern. I was informed that Richardson had been removed from command because he hurt Mr. Roosevelt's feelings by some forceful recommendations . . ."). On Richardson's relief, see HOAXIE, *supra* note 13, at 47 (Admiral J. O. Richardson relieved of command in February 1941 after his outspoken protest of the vulnerability of Pearl Harbor). Kimmel came by his command and four-star status through the exercise of a power that could obviously revoke what it bestowed.

subordinate commanders, and the propriety of the relief of Kimmel and Short from command by the Secretaries of the Navy and War Departments.

B. Law Applicable to Relief of Command

No one in the military has a right to any particular assignment or position⁵⁰ and may be reassigned to a position of greater or lesser responsibility by senior officials in the chain of command at the discretion of such officials.⁵¹ This authority flows from the President's constitutional powers as Commander in Chief,⁵² and is so well established that the courts do not recognize an individual right to seek judicial review of military personnel assignment decisions.⁵³ The courts recognize their own lack of practical

49. Secretary of the Navy Knox directed the relief of Admiral Kimmel on 16 December 1941 (PHA (pt. 5), *supra* note 42, at 2430), confirmed by Secretary of the Navy letter 14358 (3 Jan. 1942). Secretary of War Stimson directed the relief of Lieutenant General Short on 16 December 1941 (PHA (pt. 3), at 1529), confirmed by telegram of 6 January 1942. In later testimony at the PHA hearings, Admiral Stark and General Marshall were unable to confirm whether the President himself directed such reliefs to be effected (PHA (pt. 5), at 2430; PHA (pt. 3), at 1529-30) but Admiral Stark related that Secretary Knox took the action after returning from a meeting at the White House (PHA (pt. 5), at 2430). In any event, the official acts of the secretaries carry the weight of presidential authority. *Supra* notes 16-17 and accompanying text.

50. *E.g.*, *Orloff v. Willoughby*, 345 U.S. 83 (1953) (no right to particular duty assignment); *Nunn*, *supra* note 10, at 562 ("[N]o Servicemember is guaranteed a particular assignment in a particular location Every military man and woman must be prepared to serve wherever and in whatever capacity the Armed Forces require their skills." (quoting General Colin Powell's written response to a question posed by the Senate Armed Services Committee)).

51. Navy regulations in effect at the time of the attack on Pearl Harbor provided specifically that "[o]fficers of the Navy shall perform such duty at sea or on shore as may be assigned them by the department." U.S. Navy Regulations, art. 161 (1920). See *Orloff*, 345 U.S. at 93-94 ("There must be a wide latitude to those in command to determine duty assignments"); *Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986) (Military enjoys "broad discretionary authority with respect to transfers of military personnel."); *Nunn*, *supra* note 10, at 559 (Duties and assignments are determined by military necessity, not personal choice.). Cf. *Cortright v. Resor*, 447 F.2d 245 (2d Cir. 1971), *cert. denied*, 405 U.S. 965 (1972) (Court declined to interfere with military discretion to issue transfer orders, notwithstanding appearance of command retaliation in reassignment.).

52. See, *e.g.*, *United States v. Ezell*, 6 M.J. 307 (C.M.A. 1979) (President as Commander in Chief has power to deploy troops and assign duties as he deems necessary.); 9 Op. Att'y Gen. 462, 468 (1860) (Advising the President: "As commander-in-chief of the Army it is your right to decide according to your own judgment what officer shall perform any particular duty."); *SMITH*, *supra* note 8, at 48 ("[T]he President has complete freedom in choosing any officer for particular duty or command . . . and this without regard to seniority in rank."); *BERDAHL*, *supra* note 6, at 127 ("The President is entirely free to select whom he will from among the officers for any particular duty or command . . .").

competence to review and revise such decisions.⁵⁴ The courts also recognize the separation of powers principles that protect from judicial interference the discretion of the Executive Branch to determine the assignments of military personnel.⁵⁵

The power to assign military personnel includes the power to reassign them, including the most senior officers. Examples of the summary relief of officers in high positions of command are legion.⁵⁶ The authority to replace military personnel in key positions of command before their regular rotation dates has been exercised with more or less vigor depending on the exigencies of peace or war, and on the personal styles of different Presidents and other senior officials in the chain of command. The authority to relieve an officer of command, however, remains a key constitutional prerogative of the President,⁵⁷ whether exercised personally or through his executive officers. No procedures and no substantive standards apply to relief of command by the Commander in Chief. A subordinate commander's potential to render future effective service, whether he is actually guilty of some offense or inadequacy in command, whether all the facts precipitating his relief are established by adequate evidence, or whether he has been allowed to make a statement or present his own evidence are all

53. *Orloff*, 345 U.S. at 93-94 (no right to judicial review of duty assignment—"[W]e have found no case where this court has assumed to revise duty orders as to one lawfully in the service."); *Armheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970) (Courts have no jurisdiction to review military duty assignments.).

54. *E.g.*, *Covington v. Anderson*, 487 F.2d 660, 665 (9th Cir. 1973) (quoting with approval *Armheiter v. Ignatius*, 292 F. Supp. 911, 921 (N.D. Cal. 1968), *aff'd sub nom Armheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970) ("Any attempt of the federal courts . . . to take over review of military duty assignments, commands and promotions would obviously be fraught with practical difficulties for both the armed forces and the courts.")). See also *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U. L. REV. 181, 187 (1962): "[T]he special relationships that define military life have supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that 'courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have.'").

55. *Orloff*, 345 U.S. at 83; *Sebra*, 801 F.2d at 1142; *Wilson v. Walker*, 777 F.2d 427, 429 (8th Cir. 1985) ("[T]raditional notions of judicial restraint and of the separation of powers" require courts to refrain from interfering in such matters as military duty assignments.); *Covington v. Anderson*, 487 F.2d 660, 665 (9th Cir. 1973); *Luftig v. McNamara*, 252 F. Supp. 819 (D.D.C. 1966) (Court refused to enjoin plaintiff's duty assignment on grounds that it could not preempt the Commander in Chief's judgment concerning disposition of forces). See Edward F. Sherman, *Judicial Review of Military Determinations*, 55 VA. L. REV. 483 (1969) (Judicial reluctance to review military personnel determinations is based on (1) inability of the courts to gauge the effects of judicial intrusion on unique discipline requirements of the military, and (2) separation of powers principles.).

irrelevant. The decision to relieve an officer of command is in no sense adjudicative. The President has plenary, unreviewable authority to assign

56. *E.g.*, LEWIS W. KOENIG, *THE CHIEF EXECUTIVE* 243-45 (1975) (McClellan and MacArthur); HASSLER, *supra* note 8, at 61-67 (Lincoln's appointment and removal of Army commanders); LINCOLN AND HIS GENERALS, *supra* note 34, at 8, 43 (Lincoln appointed McClellan to relieve Winfield Scott), 38-39 (Lincoln dispatched the Secretary of War to relieve Fremont, who, pained and humiliated, begged for a chance to deliver a victory before official delivery of Lincoln's letter), 57 (Lincoln replaced Secretary of War Cameron with Stanton), 70-71 (Lincoln relieved McClellan as General in Chief of the Army—the relieving order was published in the newspapers before delivery to McClellan, who discovered it by a telegram from friends), 134 (Lincoln appointed Halleck General in Chief), 151, 182-83 (Lincoln directed Halleck to relieve Buell), 161 (Lincoln directed Halleck to relieve Pope), 177 (Lincoln relieved McClellan of his remaining command and appointed Burnside in his place), 206 (Lincoln relieved Burnside and appointed Hooker), 214, 347 (Lincoln relieved Butler, a political patronage appointment), 231-32 (Grant relieved McClelland, who appealed to Lincoln; Lincoln responded: "Better leave it where the law of the case has placed it."), 259-60 (Lincoln relieved Hooker and appointed Meade), 297 (Congress revived the rank of lieutenant general, to which Lincoln appointed Major General Grant, who replaced Halleck as General in Chief).

That Chief of Staff George C. Marshall turned the Army rank structure upside down in preparation for World War II is also well known. Marshall relieved hundreds of senior officers of their posts and forced others into retirement, most of them without the distinction of having presided over a national disaster beforehand. Moreover, many junior officers, including one Colonel Eisenhower, were promoted over the heads of hundreds of more senior officers during the war. The high visibility of Marshall's personal shaping of the Army officer corps, including his use of an ad hoc "plucking board," demonstrates the understanding of the law relating to the rights of officers in their posts that prevailed in the armed forces at the time. See FORREST C. POGUE, *GEORGE C. MARSHALL 192-100* (1965) ("[A]greeing to the harsh reproach that he was ruthless in removing officers from command," Marshall responded that he "was preparing an army for war and felt that the selection of those who could lead in battle was a duty he owed the state."); ED CRAY, *GENERAL OF THE ARMY: GEORGE C. MARSHALL, SOLDIER AND STATESMAN 174-76* (1990) (Through his personally supervised program of promotions and forced retirements, Marshall shaped "an army in his own image.").

In company with General Short, the following Army Major Generals were relieved during the Second World War and reverted to their permanent ranks: Carlos Brewer, Lloyd D. Brown, William G. McMahon, Lindsay M. Sylvester, Leroy Watson, Henry W. Baird, Julian F. Barnes, Joseph M. Cummins, Ernest J. Dawley, James P. Marley, James L. Muir, and Paul L. Ranson. Memorandum from Lieutenant General Brooks to General Bradley, file no. 3757 (13 May 1949) (CSJAGA 1949/3757 (CSGPA 201)). Admiral Ernest J. King, Chief of Naval Operations from 1942 through 1945, was notorious for his hard-nosed insistence on personally assigning all flag officers, commanding officers of capital ships and holders of major shore billets. King replaced several flag officers during World War II. President Truman's relief of General MacArthur during the Korean War may be the most dramatic recent example of Presidential exercise of the power to choose commanders. David McCullough, *Truman Fires MacArthur*, *MIL. HIST. Q.*, Autumn 1992, at 8; DOROTHY SHAFFTER & DOROTHY M. MATHEWS, *THE POWERS OF THE PRESIDENT AS COMMANDER IN CHIEF OF THE ARMY AND NAVY OF THE UNITED STATES*, H.R. DOC. NO. 84-443, at 13 (1956).

and relieve officers.⁵⁸ As President Truman stated of his relief of General MacArthur during the Korean War: "You hire them, and you fire them."⁵⁹

The removal of officers from their posts by lesser officials within the military is governed by service procedures to ensure that meritorious officers are not discarded through hasty decisions. Such procedures, to the extent that any procedures are implemented, are designed to ensure that seniors in the chain of command review the merits of decisions to relieve subordinate officers. Review is provided to ensure that the discretion to relieve subordinate officers is exercised wisely—not because individual officers have enforceable "due process" rights in such decisions.⁶⁰ Reflecting longstanding Navy tradition, procedures in the current *Naval Military Personnel Manual* governing "detachment for cause" recognize four reasons for removal of any officer from his assigned post, providing for the highest degree of discretion in the relief of officers serving in posi-

57. E.g., KOENIG, *supra* note 56, at 242-43 ("As Commander-in-Chief the President appoints and removes his field generals."); HASSLER, *supra* note 8, at 9 ("As part of his authority as Commander in Chief, the Chief Executive was empowered by the Constitution . . . at any time to . . . change commanders, or directly interfere in any detail of command . . ."); SMITH, *supra* note 8, at 48 ("[T]he President . . . may at his discretion remove any officer from a position of command.").

58. See CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 2 (1976):

In exercising his lofty prerogatives as 'Commander in Chief of the Army and Navy of the United States,' the President would seem to enjoy a peculiar degree of freedom from the review and restraints of the judicial process The . . . appointment and removal of 'high brass' . . . are matters over which no court would or could exercise the slightest measure of judgment or restraint. For his conduct of such affairs the President is responsible, so far as he can be held responsible, only to Congress, the electorate, and the pages of history.

See also *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970) (no jurisdiction to review relief of commanding officer).

59. HASSLER, *supra* note 8, at 128. That the sweeping constitutional power of the President over the assignments of officers might not have been clear to Rear Admiral Kimmel is reflected in Kimmel's verdict upon President Roosevelt's relief of Richardson, Kimmel's predecessor: "I could see then and can see now no adequate reason for his removal from command in such a manner." *Kimmel's Own Story*, *supra* note 46, at 69. The President need not have or express any reason for such decisions.

60. E.g., *Wilson v. Walker*, 777 F.2d 427 (8th Cir. 1985) (no individual due process interest in duty assignment); *Arnheiter v. Ignatius*, 292 F. Supp. 911, 926 (N.D. Ca. 1968), *aff'd sub nom.* *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970) (Summary relief of officer in command was "purely internal, administrative, non-punitive Navy action" and was "clearly within its [the Navy's] powers."); *Palmer v. United States*, 72 Ct. Cl. 401, 406 (1931) (Military departmental regulations that might not have been followed existed "solely in the interest of orderly and consistent procedures in the service" and did not create personal rights.).

tions of command: mere "loss of confidence in an officer in command."⁶¹ This highly discretionary basis for detachment of an officer in command reflects the critical importance of trust and confidence by the chain of command:

The unique position of trust and responsibility an officer in command possesses; his or her role in shaping morale, good order, and discipline within the command; and his or her influence on mission requirements and command readiness make it imperative that immediate superiors have full confidence in the officer's judgment and ability to command.⁶²

The *Naval Military Personnel Manual* states further that "[a]n evaluation by a superior in the chain of command of failure on the part of an officer in command to exercise sound judgment in one or more areas and loss of confidence will constitute a sufficient basis to request the DFC [Detachment for Cause] of that officer." After detailing the administrative process required to effect a "detachment for cause," the *Manual* distinguishes "summary relief." "Nothing in the foregoing derogates the inherent authority of a superior in command to relieve an officer in command of a subordinate unit to ensure accomplishment of the assigned mission."⁶³ "Summary relief" involves *no* process and may be effected instantaneously. The difference between summary relief and detachment for cause is that a specific, stigmatic record of the detachment process may not be inserted in an officer's official promotion record until administrative

61. Memorandum from Deputy Assistant Judge Advocate General for Administrative Law to Commander in Chief, U.S. Pacific Fleet Force Judge Advocate (6 Oct. 1992) (memo 5800 Ser IMA1156A.92) [hereinafter DAJAG Memo] (Detachment of an officer "for cause" may, in accordance with applicable regulations, be based upon the subjective standard of "loss of confidence in an officer in command."). Commenting on the relief of MacArthur, General Omar Bradley pointed out that the President has the right to fire any officer "at any time he sees fit," even if he has merely lost confidence in the man's judgment. MANCHESTER, *supra* note 34, at 648-55. The other bases for detachment for cause of an officer under current regulations include (1) misconduct, (2) unsatisfactory performance involving one or more significant events resulting from gross negligence or disregard of duty, and (3) unsatisfactory performance of duty over an extended period of time. U.S. NAVY, NAVAL MILITARY PERSONNEL MANUAL [hereinafter MILPERSMAN] (NAVPERS 15560C) art. 3410105.3 (1995). See also U.S. NAVY, BUREAU OF NAVAL PERSONNEL MANUAL (NAVPERS 15791A) art. C-7801(4) (1959). Army policy for relief of an officer in command is stated in U.S. DEP'T OF ARMY, REG. 600-20, ARMY COMMAND POLICY, para. 2-15 (30 Mar. 1988) (written action to relieve must be reviewed by the first general officer in the chain of command.).

62. MILPERSMAN, *supra* note 61, at 3410105.3d.

63. *Id.* at 3410105.7f.

detachment for cause procedures are accomplished. These procedures do not protect an individual's continuity in command or in any other assignment; they relate to the type of record that will be made of a relief and whether future selection boards may consider details surrounding the relief.

Under service regulations, removal of an officer from a position of command does not require adversarial, trial-like procedures (such as confrontation and cross-examination of witnesses, compulsory process to secure the attendance of witnesses and the production of documents, and representation by legal counsel).⁶⁴ Such procedures would be extremely corrosive of discipline, pit subordinates and superiors in a chain of command against each other, and make more difficult the process of ensuring unit cohesion and the ability of a military unit to fulfill its mission.⁶⁵ The decision of a commander in the chain of command to relieve a subordinate commander may be "reversed" by others in the chain of command who are superior to the commander who decided to effect such a relief. When the President himself decides to relieve a commander, however, there is no appeal or review unless the President, in his sole discretion, decides to entertain additional matters in favor of the officer he has relieved.

The ability to select and remove military leaders in key positions is a fundamental, strategic component of Presidential command authority.⁶⁶ As experience has taught, the preservation of vital national interests demands no less than unfettered discretion of the President and his appointed commanders to assign to key positions those subordinate commanders deemed most capable of achieving success.⁶⁷ Only President Lincoln exercised the power to select and assign duties to his subordinate military commanders more aggressively than President Franklin D. Roosevelt.⁶⁸ Kimmel and Short were two among many who experienced

64. Cf. DAJAG Memo, *supra* note 61 (Detachment of an officer for cause is an example of the type of discretionary "final agency action" that does not require a hearing under the Administrative Procedures Act.).

65. E.g., *Sebra v. Neville*, 801 F.2d 1135, 1141 (9th Cir. 1986) ("The policy behind these decisions [citations omitted] is clear: the military would grind to a halt if every transfer were open to legal challenge.").

the President's personal exercise of command authority as "first General and Admiral."⁶⁹

66. See, e.g., MICHAEL I. HANDEL, *MASTERS OF WAR: CLASSICAL STRATEGIC THOUGHT* 153-76 (1992) (importance and characteristics of the effective military commander); Scott Shuger, *General Failure: What the Press Doesn't Tell You About America's Military Leaders*, 23 WASH. MONTHLY, Mar. 1991, No. 3, at 11:

[A]n essential component of success in war is generalship (and admiralship). A crafty general is the ultimate smart weapon . . . Generals are weapons too. And like any other weapon, they should be evaluated for what they bring to a war effort . . . Like any other reasonably complex task, fighting war has objective and subjective components. And the quality of command is one of those subjective components that is essential to a war's outcome.

KOENIG, *supra* note 56, at 242-43 ("In wartime" the President's authority to choose commanders "is especially important because of the consequences of the President's choice for the nation's survival and his own political future."); T. Harry Williams, *Lincoln* (1861-1865), in *THE ULTIMATE DECISION*, *supra* note 15, at 85-86 ("One of the most important functions Commander in Chief Lincoln had to perform was choosing generals to manage the armies."); SMITH, *supra* note 8, at 48 ("One of the essential powers of the President as commander-in-chief is that of naming the commanders of forces in the field."); BARON ANTOINE-HENRI DE JOMINI, *THE ART OF WAR* 43 (1862) ("If the skill of the general is one of the surest elements of victory, it will be readily seen that the judicious selection of generals is one of the most delicate points in the science of government and one of the most essential parts of the military policy of a state."). All citizens may enjoy fundamental rights equally in the eyes of the civil law, but all commanders are not equal warriors. People fight wars, and the employment of people in the military in the manner deemed most likely to achieve success is central to the Commander in Chief power. The power of selection is entirely a subjective one, entrusted uniquely to the President. The courts have recognized the relationship between the assignment of different tasks to different individuals and overall military efficiency (the human-strategic dimension of personnel assignments), as well as the importance of Presidential autonomy in this area. E.g., *Sebra*, 801 F.2d at 1142 ("[M]ilitary transfer decisions go to the core of deployment of troops and overall strategies"); *Luftig v. McNamara*, 252 F. Supp. 819, 821 (D.D.C. 1966) ("The courts may not substitute themselves for the Commander in Chief of the Army and Navy and determine the disposition of members of the Armed Forces.").

67. See, e.g., *LINCOLN AND HIS GENERALS*, *supra* note 34, at 151 (General in Chief Halleck's comment on Lincoln's vigorous exercise of the Commander in Chief power with respect to assignment of commanders: "The government seems determined to apply the guillotine to all unsuccessful generals."). Indeed, one of the faults attributed to General Short by the Army Pearl Harbor Board was "not replacing inefficient staff officers." ROBERT A. THEOBALD, *THE FINAL SECRET OF PEARL HARBOR* 160 (1954) (emphasis added); PHA (pt. 3), *supra* note 42, at 1451.

68. E.g., SMITH, *supra* note 8, at 50, 128, 133 (During World War II, FDR "exercised in full the authority of naming military commanders and left them in no uncertainty as to the source of their authority." Demonstrating his understanding of the Commander in Chief's personal power to reassign individual officers, FDR at one point threatened to send dissident officers to Guam.)

69. *THE FEDERALIST* No. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

As staunch a defender of Rear Admiral Kimmel as his predecessor, Admiral J. O. Richardson, has stated that:

[T]he reliefs of Kimmel and Short should have been dispatched as soon as possible. The Army and Navy and everyone else would have understood and approved this action, because all would have recognized that, regardless of where the blame lay, no armed force should remain under the command of a leader under whom it had suffered such a loss.⁷⁰

Even Kimmel's counsel, Edward B. Hanify, cited approvingly the comments of Admiral William H. Standley, a member of the Roberts Commission: "under the circumstances Admiral Kimmel and General Short had to be relieved of their commands."⁷¹

C. Due Process and Right to Rank or Office

The President's constitutional power to relieve Kimmel and Short, causing their reversion to the grades of Rear Admiral and Major General, did not "trump" individual rights possessed by the commanders. Complementary to the President's power was the commanders' absolute lack of rights to their ranks or their offices. Kimmel and Short advocates allege repeatedly that the commanders were denied due process. The Due Process Clause does not apply whenever prejudicial action is taken against an individual; instead, it applies only when a "life, liberty or property" inter-

70. J. O. RICHARDSON, ON THE TREADMILL TO PEARL HARBOR, THE MEMOIRS OF ADMIRAL JAMES O. RICHARDSON, AS TOLD TO VICE ADMIRAL GEORGE C. DYER, USN (RETIRED) 455 (1973). Cf. *Greer v. Spock*, 424 U.S. 828, 840 (1976) ("[N]othing in the Constitution . . . disables a military commander from acting to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of the troops under his command.").

71. E.g., Memorandum from Edward B. Hanify, *Ropes & Gray*, to Director of Naval History (23 Dec. 1987) (OP-09BH), quoting from HUSBAND E. KIMMEL, ADMIRAL KIMMEL'S STORY 143-44 (1955). Admiral Standley's quoted statement continued that he, Admiral Standley, regretted that Admiral Kimmel "had to go," praising the "state of efficiency" of the fleet. Praise of the post-disaster "state of efficiency" of the fleet, however, is not a comment on the quality of Admiral Kimmel's decision-making on how to employ the fleet before the attack. Instead, the statement tends to indicate, more tragically, that the fleet was equipped, trained and ready to undertake whatever orders Kimmel might have issued, focusing inquiry on the high-level command decisions that led to the fleet being in-port on Sunday, 7 December in, essentially, a routine, peace time readiness posture.

est recognized by the Constitution is affected. No military officer has a constitutional due process interest in his rank or office.

Before measuring government action against Kimmel and Short against the requirements of the Due Process Clause of the Fifth Amendment, the threshold question must be asked whether the protections of the Bill of Rights apply to members of the military at all. As surprising as the question might seem, the answer is even more surprising. The traditional view stated by the Supreme Court was that the Bill of Rights did not apply, that Congress determined the rights and responsibilities of service members pursuant to its constitutional power "To make Rules for the Government and Regulation of the land and naval Forces."⁷² Commentators have noted the long tradition of this basic tenet in the federal courts.⁷³ As if struggling with an uneasy conscience over this principle, the Supreme Court has made great efforts to justify the attenuation of rights in the military on the basis of the unique need for discipline in the military and the fundamental dissimilarity of military culture from civilian society—the so-called "separate community" doctrine.⁷⁴ In recent cases the Court has

72. U.S. CONST. art. 1, § 8. E.g., *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 138 (1866) ("[T]he power of Congress, in the government of the land and naval forces, . . . is not at all affected by the fifth or any other amendment."); *Swain v. United States*, 28 Ct. Cl. 173, 217 (1893), *aff'd*, 165 U.S. 553 (1897) ("When a person enters the military service, whether as officer or private, he surrenders his personal rights and submits himself to a code of laws and obligations wholly inconsistent with the principles which measure our constitutional rights.").

73. E.g., Karen A. Ruzic, *Military Justice and the Supreme Court's Outdated Standard of Deference: Weiss v. United States*, 70 CHL.-KENT. L. REV. 265, 269 (1994) ("Intense debate has continued over the applicability of the Bill of Rights to individual members of the military."); Hon. Walter T. Cox III, *The Army, the Courts, and the Constitution: the Evolution of Military Justice*, 118 MIL L. REV. 1, 15-16, 23 (1987) (As late as 1957-58 we were still debating whether military members enjoyed the protections of the Bill of Rights at courts-martial.); JOSEPH W. BISHOP, JR., *JUSTICE UNDER FIRE* 114-15 (1974) (historical inapplicability of the Bill of Rights in the military context); LAWYER'S COOP. PUB. CO., *MILITARY JURISPRUDENCE* 35-36 (1951) (digest of cases holding the amendments to the Constitution inapplicable at courts-martial).

74. E.g., *Parker v. Levy*, 417 U.S. 733, 743, 758 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it."); *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953) ("The military constitutes a specialized community governed by a separate discipline from that of the civilian."); *Carter v. McLaughrey*, 183 U.S. 365, 390 (1902) (Members of the military belong to a "separate community recognized by the Constitution."). See James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C. L. REV. 177, 178 (1984).

not stated specifically that the Bill of Rights does not apply, but it holds repeatedly that the rights of service members are different, and it defers to the judgment of Congress and the President.⁷⁵ The ultimate question is still open,⁷⁶ but the enactment of statutory provisions that provide many constitutional-equivalent protections has largely mooted the issue.⁷⁷

The applicability of the Due Process Clause to administrative actions taken in the 1940s against Kimmel and Short is not an open question. In three precedential cases involving prejudicial administrative action against military officers that fell short of ordinary due process standards, the Supreme Court held that the Fifth Amendment Due Process Clause did not impose procedural requirements in the military context.⁷⁸ Moreover, in 1950, in a case in which a court-martial had convicted the accused of murder and sentenced him to imprisonment, the Supreme Court quashed a fledgling trend among federal courts to apply Fifth Amendment due process standards in habeas corpus review proceedings, holding that "[t]he single inquiry, the test" of the adequacy of courts-martial "is jurisdiction."⁷⁹ If the court-martial had jurisdiction over the offense and the accused, its procedures were inscrutable.⁸⁰ In 1953, the Court suggested in dictum in a court-martial habeas corpus case involving the death penalty

75. *E.g.*, *Weiss v. United States*, 510 U.S. 163, 177 (1994) ("The Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment.'"); *Solorio v. United States*, 483 U.S. 435, 447-48 (1987) ("Congress has primary responsibility for the delicate task of balancing the rights of servicemen against the needs of the military We have adhered to this principle of deference in a variety of contexts where . . . the constitutional rights of servicemen were implicated."); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) ("[T]he rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty"). See *Nunn*, *supra* note 10, at 565 ("Differences in constitutional rights between the armed forces and civilian society have existed from the days of the Revolutionary War Throughout our history, members of the armed forces have been subjected to controls and regulations that would not have been tolerated in civilian society.").

76. *E.g.*, *United States v. Lopez*, 35 M.J. 35, 41 (C.M.A. 1992) ("[T]he Supreme Court has never expressly applied the Bill of Rights to the military"). But see *United States v. Jacoby*, 11 U.S.C.M.A. 428, 430-31, 29 C.M.R. 244, 246-47 (1960) (first case in which the United States Court of Military Appeals held that the Bill of Rights does apply, "except those which are expressly or by necessary implication inapplicable").

77. See *Cox*, *supra* note 73, at 28 (discussing constitutional concepts in the Uniform Code of Military Justice (enacted 1950) and the many amendments enacted after the Vietnam War.). Military Rules of Evidence 301, 304, 305, 311-17 and UCMJ Article 31 apply constitutional-equivalent principles.

78. *United States ex rel. French v. Weeks*, 259 U.S. 326 (1922); *United States ex rel. Creary v. Weeks*, 259 U.S. 336 (1922); *Reaves v. Ainsworth*, 219 U.S. 296 (1911).

79. *Hiatt v. Brown*, 339 U.S. 103, 110 (1950).

that some principles of fundamental procedural fairness derived from the Due Process Clause should apply in review of courts-martial,⁸¹ but the court affirmed the judgment of the court-martial anyway, deferring to post-trial reviews conducted within the chain of command. The Court has never applied the Due Process Clause to reverse a discretionary military administrative action.⁸² If the law in effect through at least 1950 did not recognize civilian-equivalent due process in courts-martial (which could adjudge death sentences), then complaints that due process was not observed in the non-punitive, administrative actions taken with respect to Kimmel and Short certainly fail to state claims based on law. In *Reaves v. Ainsworth*,⁸³ the Court's seminal case on due process review of military administrative actions, the Court expressed dismay at the very idea of judicial interference with military administration, holding that review of such actions lay exclusively within the Executive Branch unless Congress had clearly expressed in legislation its intention to allow military members to carry their complaints "over the head of the President."⁸⁴

The Due Process Clause in the Fifth Amendment states that "No person shall be . . . deprived of life, liberty, or property, without due process of law."⁸⁵ Assuming, arguendo, general applicability of the Due Process

80. This holding reinforced a long line of cases restricting reviewability of courts-martial to the single issue of jurisdiction. See *United States v. Newak*, 15 M.J. 541, 552 (A.F.C.M.R. 1982) (listing eighteen Supreme Court cases). The seminal case on the limited reviewability of courts-martial was *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857). See also *Grafton v. United States*, 206 U.S. 333, 345-46 (1907) (review limited to jurisdiction, notwithstanding the existence of other obvious error).

81. *Burns v. Wilson*, 346 U.S. 137, 142-43 (1953).

82. See Darrell L. Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL L. REV. 1, 39 (1975). In reviewing due process claims in courts-martial, the Court still defers to the procedures provided by Congress without imposing additional requirements based on the Fifth Amendment. *E.g.*, *Weiss v. United States*, 510 U.S. 163, 177 (1994); *Middendorf v. Henry*, 425 U.S. 25, 43-44 (1976) (noting the view of Judge Quinn of the Court of Military Appeals that the Bill of Rights applied with equal force to the military, but holding that plaintiffs did not have civilian-equivalent due process rights under the Fifth Amendment); *Schlesinger v. Ballard*, 419 U.S. 498, 510 (1975).

83. 219 U.S. 296 (1911).

84. *Id.* at 304-06. Judicial reluctance to intervene in military administrative matters continued throughout and beyond the tenures of Kimmel and Short. *E.g.*, *Orloff v. Willoughby*, 345 U.S. 93-94 (1953) ("[J]udges are not given the task of running the Army . . ."); *Covington v. Anderson*, 487 F.2d 660, 664 (9th Cir. 1973) (denying plaintiff's due process claim; holding that military administrative decisions are generally immune from judicial review).

85. U.S. CONST. amend. 5.

Clause to military officers in the era of the Second World War, it is immediately apparent that no aspect of the treatment of Kimmel and Short involved capital punishment (deprivation of "life") and no aspect of their treatment involved imprisonment or involuntary detention (deprivation of "liberty"). Neither commander had any other legally cognizable property or liberty right in his temporary grade or command assignment that could call down the procedural protections of the Due Process Clause.⁸⁶ The Due Process Clause itself does not create the liberty and property interests it protects.⁸⁷ The guarantee of procedural due process does not apply to a "mere subjective expectancy."⁸⁸ Some underlying right established by other law must be at stake. Such rights must stem from independent sources.⁸⁹ While it is true that the common law of England recognized the existence of a property interest in public office, as an "incorporeal hereditament,"⁹⁰ public office in the United States, including the rank and command position of a military officer,⁹¹ has never been a personal attribute or species of property.⁹² Each successive rank an officer holds is a separate office of the United States. Courts have held repeatedly that rank and command assignment are not property within the meaning of the Due Process Clause;⁹³ because promotion, including posthumous promotion, requires a new appointment to a new office, the courts have also held that there is no right to promotion;⁹⁴ indeed, even continuation in the service in any rank or position is a privilege, not a right.⁹⁵ As stated aptly in *Street v. United States*, "The tenure of a military office has been from the foundation of the

86. *E.g.*, The President "may vacate at any time a temporary appointment in a commissioned grade," and "[t]here are no applicable regulations or directives" to limit the President's exercise of discretion in this regard. *Koster v. United States*, 685 F.2d 407, 411, 231 Ct. Cl. 301, 308 (1982) (citing 10 U.S.C. § 3447(c) (1976), which derived from Act of Aug. 10, 1956, ch. 1041, § 1, 70A Stat. 196, and has been superseded by 10 U.S.C.S. § 603(b) (1997) ("temporary appointment . . . may be vacated by the President at any time")).

87. *Regents of State Colleges v. Roth*, 408 U.S. 564 (1972).

88. *Sims v. Fox*, 505 F.2d 857, 861-62 (5th Cir. 1974).

89. *E.g.*, *Blackburg v. City of Marshall*, 42 F.3d 925, 936 (5th Cir. 1995).

90. *E.g.*, I THOMAS M. COOLEY, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS BY SIR WILLIAM BLACKSTONE 462-64, 464 n.1 (James Dewitt Andrews ed., 1899) (offices as incorporeal hereditaments; "Commissions in the Army of Great Britain were allowed to be sold until the privilege was abolished . . . in 1871."). See also *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 253-54 (1839) (Argument of counsel for respondent: Under "the law of the tenure of office in England . . . [o]ffice is . . . an incorporeal hereditament, as a right of way. There is, under the common law, an estate in an office."); *Street v. United States*, 24 Ct. Cl. 230, 247 (1889) (describing officer status in the British military until the 1870's as "an established right, founded on unbroken usage for two centuries . . . and the public regarded . . . [a] commission as . . . well-earned property, lawfully accumulated and possessed of the sanctity of a vested right . . .").

Government among the frailest known to the law, for it has been subject to the will of the President, and that will has been exercised repeatedly."⁹⁶

Because there is no "property" or "liberty" interest in serving under a particular military appointment or in a particular billet for any particular duration, there is no right to any trial-like hearing to protect or preserve a service member's interest in an appointment or assignment. Where no interest protected by the Due Process Clause is implicated, due process is not due. Any internal service procedures prescribed for the relief of offic-

91. Initial commissioning of an officer, each promotion, and particular statutorily specified military positions of "importance and responsibility" require separate Presidential appointments as separate offices of the United States. *Weiss v. United States*, 510 U.S. 163, 170 (1994). The law, as embodied in 10 U.S.C.S. § 624 (Law. Co-op. 1997) "requires a new appointment by the President, with the advice and consent of the Senate, each time a commissioned officer is promoted to a higher grade." *United States ex rel. Edwards v. Root*, 22 App. D.C. 419 (1903), *cert. denied*, 193 U.S. 673, *error dismissed sub nom. United States ex rel. Edwards v. Taft*, 195 U.S. 195 U.S. 626 (1904) (Promotion is a new appointment and can only be effected by Presidential nomination and Senate confirmation). For a partial list of particular military duty assignments that require separate appointment and confirmation, see *Weiss v. United States*, 510 U.S. 163, 171 (1994). *Cf.* 10 U.S.C.S. § 601 (Law. Co-op. 1997) (three- and four-star positions of "importance and responsibility"). All appointments are entirely discretionary with the President; for example, the results of promotion selection boards are advisory only. The President may select for promotion an officer not recommended by a selection board, and he may reject officers a selection board has chosen. 10 U.S.C.S. § 629(a) (Law. Co-op. 1997) ("The President may remove the name of any officer from a list of officers recommended for promotion by a selection board."); 41 Op. Att'y Gen. 291 (1956) (President may nominate for promotion to brigadier general an officer not selected for promotion by a statutory selection board: "[T]he President may not be bound in his selection to an officer or group of officers merely because in the opinion of others they are better qualified for promotion. To so hold would be to substitute the judgment of subordinate officers for that of the President and to unduly restrict his constitutional appointive authority."); L. Neal Ellis, *Judicial Review of Promotions in the Military*, 98 MIL. L. REV. 129, 133 (1982) ("Selection board determinations are only recommendations to the service secretary who in turn makes recommendations to the President. The President then appoints all officers subject to Senate confirmation."). Officer appointments must be confirmed by the Senate, which has unconstrained discretion to confirm or deny any nomination on any ground it chooses. The Constitution does, however, allow Congress by statutory provision to waive Senate confirmation of particular appointments. U. S. CONST. art. 2, § 2 ("Congress may by law vest the Appointment of . . . inferior Officers . . . in the President alone . . ."); *Collins v. United States*, 14 Ct. Cl. 568 (1879) (Military officers are "inferior officers" under the Constitution and Congress may permit the President to appoint them without Senate advice and consent.). The President appointed Kimmel and Short to four- and three-star offices for which appointment power had been vested by statute in him alone. *Supra* notes 40-42. The law applicable to assignments and promotions is founded upon political discretion and seems not to have created a property interest upon which the Due Process Clause may operate.

ers in command, including the opportunity for officers in command to challenge or comment on such decisions,⁹⁷ exist purely as discretionary

92. *E.g.*, *Hennen*, 38 U.S. at 260 ("The tenure of ancient common law offices, and the rules and principles by which they are governed, have no application . . . [T]here is no ancient usage which can apply to and govern the tenure of offices created by our Constitution and laws.") (Argument of counsel for respondent, at 38 U.S. 253-54, adopted by the Court: "There is in this country no estate in any office. Offices are held for the benefit of the community . . ."; *CORWIN ESSAYS*, *supra* note 17, at 110-11 ("[A]ll appointive officials are subject to removal by the appropriate authority . . . there is no 'estate in office.'"); *I COOLEY*, *supra* note 90, at 463 n.1 (In the United States, public offices have always been held at the pleasure of the government and have never been considered property). The Constitution reflects the repugnance of the Founders for titular offices that are personal to the holder and take on the nature of property. The Constitution provides that "No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of Congress, accept of any . . . Office, or Title, of any kind whatever, from any King, Prince, or foreign State." U.S. CONST. art. 1, § 9. In the United States public offices are the "property" of the people.

93. *E.g.*, *Pauls v. Secretary of the Air Force*, 457 F.2d 294, 297 (1st Cir. 1972) (no due process interest in promotion); *Lane v. Secretary of the Army*, 504 F. Supp. 39, 42 (D. Md. 1980); *Arnheiter v. Ignatius*, 292 F. Supp. 911, 920-21 (N.D. Ca 1968), *aff'd sub nom. Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970) (military duty assignment and promotion status do not involve any life, liberty or property rights protected by the due process clause); *Koster v. United States*, 685 F.2d 407, 413, 231 Ct. Cl. 301, 310 (1982) (brigadier general "had no property right in his temporary rank" of major general). See also *DAJAG Memo*, *supra* note 61 ("[N]o member of the armed forces has a property right in any particular command or duty assignment.").

94. *Reaves v. Ainsworth*, 219 U.S. 296 (1910); *VanderMolen v. Stetson*, 571 F.2d 617, 627 (D.C. Cir. 1977); *Abruzzo v. United States*, 513 F.2d 608, 611 (Ct. Cl. 1975); *Pauls v. Secretary of the Air Force*, 457 F.2d 294, 297 (1st Cir. 1972); *Viles v. Claytor*, 481 F. Supp. 465, 470 (D.D.C. 1979); *Coughlin v. Alexander*, 446 F. Supp. 1024, 1026 (D.D.C. 1978). Courts will not order a promotion. *E.g.*, *Ewanus v. United States*, 225 Ct. Cl. 598 (1980) (court lacks power to order promotion, even if failure to obtain promotion was based on defective information).

95. *E.g.*, *Reaves*, 219 U.S. at 297, 304 (To petitioner's argument that "his commission in the army constituted property of which to be retired from the army, with pay for life, was a valuable attribute, and of which he could not be deprived without due process of law" the Supreme Court responded that petitioner did not have "any right of property, title or interest in the alleged office."); *Crenshaw v. United States*, 134 U.S. 99 (1890) (Naval officer has no vested right in his office and may be dismissed from the service without a hearing.); *Weeks v. United States ex rel. Creary*, 277 F. 594, 51 App. D.C. 195 (1922), *aff'd*, *United States ex rel. Creary v. Weeks*, 259 U.S. 336 (1922) (Military officer has no property or contract right in his office; office is revocable by the sovereignty at will.); *Sims v. Fox*, 505 F.2d 857, 861-62 (5th Cir. 1974) (no due process property right in continuation of service); *Kuta v. Secretary of the Army*, No. 76 C 1624, slip op. (N.D. Ill. Aug. 22, 1978) ("Service in the armed forces is a privilege and not a right.").

96. 24 Ct. Cl. 230, 247 (1889).

97. *E.g.*, such as those in the current *MILPERSMAN*, *supra* note 61, at 3410105 (detachment for cause and relief of command).

measures within the military to ensure that personnel resources are utilized effectively. If such procedures are not followed, the aggrieved party is not the individual commanding officer relieved of his command, but the military institution itself. No service procedures have been prescribed for summary relief of an officer in command, nor have any procedures been prescribed for Presidential decisions to relieve officers in command. The commonplace statement that officers serve "at the pleasure of the President" is not a cliché; it is a shorthand statement of a fundamental constitutional prerogative vested in the President, and it is part of the language of the Presidential commission itself.⁹⁸

D. Due Process and Investigations⁹⁹

Advocates for Kimmel and Short consider the Roberts Commission Investigation the supreme evil among the host of alleged wrongs done to the commanders.¹⁰⁰ They assert that Kimmel and Short were entitled to a formal investigation that accorded them the rights of parties: to be present throughout proceedings, to call their own witnesses, to cross-examine, to testify or not, and to be represented by counsel.¹⁰¹ According to this point of view, the President's access to information about the responsibility of

98. See *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953) ("The President's commission . . . recites that 'reposing special trust and confidence in the patriotism, valor and abilities' of the appointee he is named to the specified rank during the pleasure of the President."). Admiral Kimmel's regular commission as a Rear Admiral, signed for President Roosevelt by Secretary of the Navy Claude Swanson, states that "This Commission to continue in force during the pleasure of the President of the United States for the time being." Form N.Nav. 239, executed 7 Dec. 1937, effective from 1 Nov. 1937, in the official service record of Husband E. Kimmel.

99. Figure 1, adapted from the *Dorn Staff Study*, *supra* note 39, shows the dates of the various investigations of the Pearl Harbor disaster, leading up to the Joint Congressional Committee (JCC) investigation in 1945-46 (PHA).

100. *E.g.*, *Thorndom Hearing*, *supra* note 38, at 18 (Edward Kimmel: "[N]o weight can be given to the findings of the Roberts Commission, yet its dereliction of duty charge is the genesis of injustice done to Admiral Kimmel."); Letter from Edward R. Kimmel & Thomas K. Kimmel to Secretary of the Navy William Ball, at 2 (May 11, 1988) ("The proceedings of the Roberts Commission were a travesty of justice . . . the Robert's [sic] Commission convicted him [Admiral Kimmel] without a trial on secret evidence, withheld from him and the public, and published the findings to the world."); Hanify Memo, *supra* note 71, at 6 ("a travesty of justice"); *Kimmel's Own Story*, *supra* note 46, at 156. Members of the Roberts Commission included Supreme Court Justice Owen Roberts, a former Chief of Naval Operations, a former CominCh/CinCPac, a retired major general and a brigadier general.

101. *E.g.*, Memorandum from Edward R. Kimmel & Thomas K. Kimmel to Director of Naval History, at 5 (23 Dec. 1987) (OP-09BH). See NAVAL COURTS AND BOARDS 357, 734 (1937) (rights of "parties" at courts of inquiry).

his subordinates must be teased out through something that looks like litigation. As authorized, the Roberts Commission conducted an "informal" investigation, one in which the body appointed to provide advice to the convening authority runs the investigative process without interference from adversarial parties. The President had charged the Roberts Commission by formal executive order on 18 December 1941, to conduct an investigation and advise "whether any derelictions of duty or errors of judgment on the part of United States Army or Navy personnel contributed to such successes as were achieved by the enemy . . . , and if so, what these derelictions or errors were, and who were responsible therefor."¹⁰² The focus of complaint against the Roberts Commission has been the single dereliction of duty finding in the final report submitted to the President: "[I]t was a dereliction of duty on the part of each of them [Kimmel and Short] not to consult and confer with the other respecting the meaning and intent of the warnings, and the appropriate measure of defense required by the imminence of hostilities."¹⁰³ Kimmel and Short advocates maintain that this finding condemned the commanders to "stigma and obloquy,"¹⁰⁴ for which the apology of posthumous promotion is now due.

Kimmel's and Short's problems with investigations did not begin with the Roberts Commission's finding of dereliction of duty. Kimmel and Short helped lay the groundwork for all later findings against them during Secretary Knox's investigation, the first investigation after the

102. PHA (pt. 7), *supra* note 42, at 3285; *id.* (pt. 23) at 1247. Apparently finding no dissonance with this executive order, Congress speedily granted the Commission power to summon witnesses and examine them under oath. *Id.* The convergence of the President's extensive supervisory powers as Commander in Chief, and Congress's "broad and sweeping," even "plenary" power to "make Rules for the Government and Regulation of the land and naval Forces" puts the Roberts Commission investigation on unimpeachable constitutional footing. *United States v. O'Brien*, 391 U.S. 367, 377 (1968), *United States ex rel. Creary v. Weeks*, 259 U.S. 326, 343 (1922).

103. PHA (pt. 7), *supra* note 42, at 3299; *id.* (pt. 16) at 2265.

104. *E.g.*, *Thurmond Hearing*, *supra* note 38, at 17, 19 (Edward Kimmel: "stigma and obloquy"), 18-19 (Edward Kimmel: The Roberts Commission's finding of dereliction of duty "captured the headline of every newspaper in the United States . . ."), 56 (Edward B. Hanify: the "smirch of delinquency" on Kimmel's reputation); Letter from Edward R. Kimmel to Chief of Naval Operations, Admiral Kelso (Oct. 23, 1991) ("We are merely seeking to have erased the stigma and obloquy stemming from a baseless and irresponsible charge of 'dereliction of duty.'"); Letter from Senators Strom Thurmond, Joseph R. Biden, Jr., John McCain, William V. Roth, & Alan Simpson to President George Bush (Oct. 17, 1991) ("the stigma and obloquy associated with the charge by the Roberts Commission . . . this charge was widely publicized.").

disaster, conducted from 9-14 December 1941. As Secretary Knox reported to the President upon his return from Pearl Harbor:

The Japanese air attack on the island of Oahu on December 7th was a complete surprise to both the Army and the Navy. Its initial success, which included almost all the damage done, was due to a lack of a state of readiness against such an air attack, by both branches of the service. This statement was made by me to both General Short and Admiral Kimmel, and both agreed that it was entirely true. There was no attempt by either Admiral Kimmel or General Short to alibi the lack of a state of readiness for the air attack. Both admitted they did not expect it, and had taken no adequate measures to meet one if it came. Both Kimmel and Short evidently regarded an air attack as extremely unlikely . . . There was evident in both Army and Navy only a very slight feeling of apprehension of any attack at all, and neither Army nor Navy were in a position of readiness because of this feeling. The loss of life and the number of wounded in this attack is a shocking result of unpreparedness.¹⁰⁵

Kimmel and Short had no right to determine the manner in which the President could seek information and advice, the scope of his quest, nor whether the Secretary of the Navy and the Roberts Commission could advise the President as they did. Moreover, they had no right to avoid exposure of actions they did and did not take in the execution of public office, or to determine the manner in which such exposure might be made. The exposure of officers in command to the powers of inspection and investigation held by their superiors in the chain of command, and the vulnerability of officers in command to disgrace for military failure, have always been a feature of military command.¹⁰⁶

The President possesses inherent power to inspect and monitor his own branch of government. Government would grind to a halt if information about important events, including "feedback" information on the function and failure of government institutions, including the performance of appointed officials, could only be collected and reported through trial-like

105. PHA (pt. 5), *supra* note 42, at 2338, 2342, 2345 (Knox Report read into testimony); *id.* (pt. 24) at 1749, 1753, 1756 (Knox Report as Exhibit 49 before the Roberts Commission). See *infra* note 422 (res gestae).

106. See, e.g., WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 518-20 (2d ed. 1920) (listing scores of famous investigations into military failures, defeats, capitulations, and scandals, focusing on responsible officers in command).

procedures.¹⁰⁷ As a practical matter, supervisors in both military and civilian settings must be able to inquire into work-related issues involving subordinates without resort to cumbersome, formal "due process" procedures.¹⁰⁸ The Executive Branch has long conducted investigations into incidents and irregularities involving federal agencies and officials. In both military and civilian governmental settings, institutional introspection through investigations and inspections is necessary to ensure governmental efficiency and to guide personnel decisions.¹⁰⁹ The public would be seriously disserved if government were not introspective. Consistent with these practical considerations, the President and his designated civilian deputies have unique constitutional investigative powers inherent in the executive power itself and not dependent upon the various statutory investigative powers provided by Congress in military codes.¹¹⁰ The President has authority to "inspect and control" *individual* subordinate executive officers;¹¹¹ the power to gather information relating to administration

107. See, e.g., *Womer v. Hampton*, 496 F.2d 99 (5th Cir. 1974) (discussion of panel investigation into irregularities in performance of Army Corps of Engineers supervisory inspector).

108. See *id.* at 104, 107.

109. E.g., EDWARD M. BYRNE, *MILITARY LAW: A HANDBOOK FOR THE NAVY AND MARINE CORPS* 250-51 (1970) (Administrative fact-finding bodies are necessary for "efficient command or administration." Investigations provide convening and reviewing authorities with "information essential to the efficient operation and readiness of the fleet or to improve some facet of administration . . . For example, they may become the bases for . . . personnel determinations.").

110. Congress enacted the Articles for the Government of the Navy, the Articles of War, and the Uniform Code of Military Justice, all including powers of investigation, under its authority "to make Rules for the Government and Regulation of the land and naval forces." U.S. CONST. art. 1, § 8. See *Martin v. Mott*, 25 U.S. (12 Wheat) 19 (1827) (President has inherent authority as Commander in Chief to develop a common law of military disciplinary procedures in cases not provided for by Congress). Military justice investigations are discussed *infra* at notes 115-18 and accompanying text.

111. 11 DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE-SEPTEMBER 1789 (Charles Bangs Bickford et al. eds., 1992), at 846 (Madison: "inspecting and controlling" subordinate officers among the powers of the President); 854-55 (Madison: "[N]o power can be more completely executive than that of appointing, inspecting and controlling subordinate officers."); THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 559 (1996) (During debates in the First Congress in 1789, James Madison asserted that it was "the intention of the Constitution . . . that the first magistrate should be responsible for the executive department," a responsibility that carried with it, he held, "the power to 'inspect and control' the conduct of subordinate executive officers."). See 1 ANNALS OF CONG. 495, 499 (Joseph Gales ed., 1789). See also CORWIN ESSAYS, *supra* note 17, at 87 (President's authority to "inspect and control" the conduct of all subordinate executive officers).

of executive agencies;¹¹² and the power to gather information to support effective exercise of the Commander in Chief power.¹¹³

The need to investigate operational military failures is even more compelling than the practical need for investigations in the federal civilian realm. The military environment involves lethal forces that pose grave dangers to individuals and to national security. A system that denied a military commander the opportunity to dispatch patrols to a failed front to gather information quickly on the demise of his forces would be unimaginable. The fundamental principle does not change because the commander is the President and the enemy's blow fell upon the dignity of flag and general officers.

The President, the Secretary of Defense, and the Secretaries of the Military Departments are courts-martial convening authorities.¹¹⁴ As such, they have unique authority and responsibility related to the investigation and disposition of suspected military offenses.¹¹⁵ Preliminary military justice investigations, like other law enforcement investigations, are informal and the commander may employ the investigative services of third parties, to include individuals or groups, or established organizations

112. *E.g.*, *Independent Meat Packers Assoc. v. Butz*, 395 F. Supp. 923, 931-32 (D. Neb.), *rev'd on other grounds*, 526 F.2d 228 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976) (Article II, section 3 of the Constitution, "by necessity, gives the President the power to gather information on the administration of executive agencies.").

113. *E.g.*, *Orloff v. Willoughby*, 345 U.S. 83, 91 (1953) (Before reposing his confidence in an officer, the President "has the right to learn whatever facts the President thinks may affect his fitness."). *Cf.* *MANUAL FOR COURTS-MARTIAL*, UNITED STATES, MIL. R. EVID. 313 (1995) [hereinafter MCM] (recognizing inspection as an incident of command, exempt from the Fourth Amendment, based on a commander's inherent authority to determine the health, welfare, military fitness, good order, discipline and readiness of subordinates within his command).

114. 10 U.S.C.S. § 822(a) (Law. Co-op. 1997) (UCMJ art. 22(a)). The law in 1941 also specified that the President and the Secretaries of the Navy and of War were convening authorities. *ARTICLES FOR THE GOVERNMENT OF THE NAVY*, art. 38 (1930), *reproduced in* *NAVAL COURTS AND BOARDS* 465, ¶ B-40 (1937) ("General courts-martial may be convened . . . by the President, the Secretary of the Navy . . ."); *LEE S. TILLOTSON, THE ARTICLES OF WAR ANNOTATED* 17 (1942).

115. MCM, *supra* note 113, R.C.M. 303, at II-20 (On the commander's preliminary inquiry: "Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses."). *See also* DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 5.1, at 192 (1992) ("In almost all cases the disposition of a suspected offense begins with an investigation by the commander . . .").

such as the Army's Criminal Investigation Division (CID), the Air Force's Office of Special Investigations (OSI) or the Naval Criminal Investigative Service (NCIS).¹¹⁶ As court-martial convening authorities, the President and the Secretaries of the services are entitled to investigate subordinate officers suspected of offenses under the same legal principles that support investigations of the most junior personnel by their respective military commanders. There is not one law of military justice for flag and general officers and another for soldiers and seamen.

Among the offenses triable by courts-martial are many unique "employment-related" failures alien to the civilian setting, such as disobedience of orders, dereliction of duty, and improper hazarding of a vessel. These are criminal offenses under military law and may be investigated under the same juridical principles that govern law enforcement investigations for homicide, larceny, or any other offense. Informal military justice investigations, like civilian law enforcement investigations, need not be conducted using trial-like procedures that afford the rights of a "party" to individuals involved in an incident under investigation. A law enforcement investigation typically does not include the active participation of suspects at each step of the investigation, including each witness interview. Yet military and civilian law enforcement investigations may result in the opinion that offenses have been committed, and in arrests or other legal processes. In furtherance of their law enforcement duties, courts-martial convening authorities at all levels of the chain of command routinely direct that administrative investigations of military failures specifically address culpability for offenses.¹¹⁷ Moreover, persons appointed to conduct investigations that involve possible military offenses may include specific pro-

116. MCM, *supra* note 113, R.C.M. 303 (Discussion), at II-20 ("The preliminary inquiry is usually informal" and the commander may seek the assistance of third parties to conduct the inquiry.). Nearly identical provisions appeared in the first *Manual for Courts-Martial* promulgated after enactment of the Uniform Code of Military Justice. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 32b, at 36 (1951). See also SCHLUETER, *supra* note 115, § 5.2, at 192 (On the commander's preliminary investigation: Information that an offense might have been committed may come from formal or informal sources; the commander may investigate personally or direct a third party to "gather more information and make a report." The investigation may include searches or seizures or "personal interrogation of a suspect or an accused.").

117. U.S. DEP'T OF NAVY, THE MANUAL OF THE JUDGE ADVOCATE GENERAL (C2, 1995) (JAGINST 5800.7C) [hereinafter JAG MANUAL] contains examples of informal investigation convening orders, specifically providing for findings and recommendations on disciplinary matters; for example: "Investigate the cause of the [mishap], resulting injuries and damages, and any fault, negligence, or responsibility therefor, and recommend appropriate administrative or disciplinary action." *Id.* at A-2-c.

posed charges and specifications with the final report forwarded to the convening authority.¹¹⁸

The President, who is also the Chief Executive of the Justice and Treasury Departments and all of their law enforcement agencies, would have reason to be familiar with the constitutional scope of his law enforcement investigative powers, powers which derive from a separate specific clause in Article 2 of the Constitution.¹¹⁹ Such powers exceed anything delineated in service regulations.

The commission form of investigation chosen by President Roosevelt to inquire further into responsibility at Pearl Harbor was not inappropriate or unlawful. Presidents have long used ad hoc commissions to conduct informal investigations of military and other matters,¹²⁰ including, for example, the "Dodge Commission" appointed by President William McKinley to investigate the War Department and the Secretary of War,¹²¹ the "Holloway Commission" appointed to investigate the failed Iranian hostage rescue mission,¹²² and the "Long Commission" to investigate the bombing of the Marine Barracks in Beirut in 1983.¹²³ Deflecting congres-

118. See *id.* at A-2-c ("If an investigating officer recommends trial by court-martial, a charge sheet drafted by the investigating officer may be prepared and submitted to the convening authority with the investigative report.").

119. U.S. CONST. art. 2, § 3 ("[H]e shall take Care that the Laws be faithfully executed . . ."). An entire, separate jurisprudence exists on this single clause and the law enforcement powers it confers.

120. E.g., CORWIN ESSAYS, *supra* note 17, at 74 (discussing the established use of ad hoc investigative commissions by presidents before Franklin Roosevelt, particularly John Tyler, Theodore Roosevelt and Herbert Hoover). The "Downing Commission" investigation is the most recent ad hoc executive commission investigation of a military disaster. See, e.g., *Remarks on American Security in a Changing World at George Washington University*, 32 WEEKLY COMP. PRES. DOC. 1404 (Aug. 5, 1996) (President Clinton: "After Khobar Towers, I immediately ordered investigations by the FBI and a commission headed by General Wayne Downing [USA, Ret.] . . ."); Art Pine, *Panel Cites Broad Security Failures in Saudi Bombing . . . Commanders Failed to Respond Adequately to Warnings*, L.A. TIMES, Sept. 17, 1996, at A1 (reporting key findings of the "Downing Commission" in its investigation of the Khobar Towers bombing in Dhahran, Saudi Arabia). The Downing Commission's report focused particularly on failings attributable to the U.S. Central Command and Air Force Brigadier General Terry Schwalier, commander of U.S. forces at Dhahran at the time of the bombing on 25 June 1996.

121. E.g., HASSLER, *supra* note 8, at 83 (The "Dodge Commission" focused on inefficiency and negligence of Secretary Russel A. Alger. McKinley dismissed Alger from office as a result.).

122. SPECIAL OPERATIONS REVIEW GROUP, RESCUE MISSION REPORT (August 1980) (final report of the "Holloway Commission," appointed in May 1980) (available in one bound volume in the Pentagon Army Library).

sional criticism of his frequent use of ad hoc commissions, Theodore Roosevelt asserted, "Congress cannot prevent the president from seeking advice."¹²⁴ Congress has in fact facilitated ad hoc advisory commissions by passing enabling legislation and providing funding.¹²⁵ This legislation, the Federal Advisory Committee Act, requires public access to the proceedings and reports of advisory commissions, absent special national security justification for secrecy.¹²⁶ President Roosevelt's decision to publish the findings of the Roberts Commission¹²⁷ was not unusual or unlawful.

Thousands of informal, administrative investigations are conducted yearly throughout the military.¹²⁸ In the Navy, the single-officer *JAG Manual* investigation is the format used most frequently to investigate mishaps.¹²⁹ Informal, single-officer *JAG Manual* investigations often find fault and recommend disciplinary action against individuals, without having observed formal, "due process" procedures.¹³⁰ Army regulations also

123. Report of the DOD Commission on Beirut International Airport Terrorist Act, Oct. 23, 1983 (Dec. 20, 1983) (final report of the "Long Commission," appointed on 7 Nov. 1983—the commission found fault with those in the chain of command, and particularly with two on-scene commanders.).

124. CORWIN ESSAYS, *supra* note 17, at 74.

125. Federal Advisory Committee Act (FACA), Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C.S. app. §§ 1-15 (Law. Co-op. 1997)) (establishing a system governing the creation and operation of advisory committees in the Executive Branch). The Act, at 5 U.S.C.S. app. § 1(a) (Law. Co-op. 1997), refers approvingly to "numerous committees, boards, commissions, councils and similar groups . . . established to advise officers and agencies in the executive branch," finding such bodies "a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government." The report of the Long Commission specifically cited FACA as authority.

126. 5 U.S.C.S. app. § 10 (1997).

127. PHA (pt. 6), *supra* note 42, at 2494; *id.* (pt. 7) at 3262.

128. The *JAG Manual* lists seven types of administrative investigations in addition to the standard accident/incident *JAG Manual* investigation, including "situation reports" required by Navy Regulations and other sources of authority; inspector general investigations; aircraft accident investigations; security violation reports; safety investigations; Naval Criminal Investigative Service investigations; and investigations of allegations of personal misconduct by senior officials. *JAG MANUAL*, *supra* note 117, para. 0202c, at 2-5.

129. In accordance with current Navy *JAG* Instruction 5830.1, and the *JAG Manual*, para. 0205, at 2-7, courts of inquiry are the preferred format for investigating major incidents. However, the convening authority and the next superior in the chain of command, may, in their discretion, determine that a court of inquiry is not warranted. *Id.* The principal source of authority for "informal," single-officer investigations in the Army is U.S. DEP'T OF ARMY, REG. 15-6, BOARDS, COMMISSIONS, AND COMMITTEES: PROCEDURE FOR INVESTIGATING OFFICERS AND BOARDS OF OFFICERS (11 May 1988) [hereinafter AR 15-6].

provide for informal administrative investigations. As stated pointedly in Army Regulation 15-6:

Appointing authorities have a right to use investigations and boards to obtain information necessary or useful in carrying out their official responsibilities. The fact that an individual may have an interest in the matter under investigation or that the information may reflect adversely on that individual does not require that the proceedings constitute a hearing for that individual.¹³¹

The principal in an administrative investigation is the commander who seeks information to support decision-making, not a subordinate who happens to be involved in the incident of interest. Investigations do not form legal judgments of responsibility. They make non-binding recommendations to the convening authority.¹³²

Congress also frequently conducts investigations that do not afford formal "due process" rights to individuals, and the courts have agreed that such rights need not be provided.¹³³ Congressional investigations in particular have focused on military and national security failures,¹³⁴ and have made political spectacles of individual military officers.¹³⁵ The Courts continue to recognize that authority to conduct "non-due process" investigations inheres in Congress's constitutional powers.¹³⁶ That Congress should have such power over agents of the Executive Branch and the President lack a similar power within his own sphere is too dissonant with the

130. *E.g.*, BYRNE, *supra* note 109, at 251 ("Fact-finding reports may provide information which is useable in connection with various personnel actions arising out of the conduct or performance of individuals, such as . . . disciplinary actions, and other administrative actions."). A recent example of a well known career-ending informal investigation is the investigation into the attack on U.S.S. *Stark* in the Persian Gulf in 1987. Letter from Rear Admiral Grant Sharp to The Judge Advocate General, Dep't of Navy (12 June 1987) (ltr 5102 Ser 00/S-0487) (recommending detachment for cause and disciplinary action against the Commanding Officer, Executive Officer and Tactical Action Officer on watch at the time of the attack).

131. AR 15-6, *supra* note 129, para. 1-6.

132. *E.g.*, BYRNE, *supra* note 109, at 250:

The primary purpose of all administrative fact-finding bodies is to provide convening and reviewing authorities adequate information upon which to base decisions in the matters involved. These bodies are not judicial. Their reports are purely advisory and their opinions, when expressed, do not constitute final determinations or legal judgments. Their recommendations, when made, are not binding upon convening or reviewing authorities.

constitutional separation of powers principle to merit serious consideration.

The Roberts Commission investigation and the various single-officer investigations in the Pearl Harbor case (e.g., Hart, Hewitt, Clausen) are not extraordinary among the thousands of investigations conducted within the Executive Branch every year. Persons interviewed in the course of such investigations, including witnesses and potential suspects, are routinely not allowed to cross-examine witnesses, to demand the inclusion of specific evidence, to inspect other evidence collected during the investigation, or to comment thereon. A convening authority may use a formal, due-process method to investigate an incident, but he is not required to do so until he has decided to initiate the process that leads to a general court-martial.¹³⁷ Before enactment of the Uniform Code of Military Justice in 1950

133. E.g., *Hannah v. Larche*, 363 U.S. 420, 443-45 (1960); *United States v. Fort*, 443 F.2d 670, 679 (D.C. Cir. 1971) (Congressional investigations are not criminal trials, and are therefore "outside the guarantees of the due process clause of the Fifth Amendment and the confrontation right guaranteed in criminal proceedings by the Sixth Amendment."). See, e.g., ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT 284, 287, 289, 296 (reprint 1973) (1928) (Congress does not follow principles of courts of law in conducting investigations; the Bill of Rights does not apply; hearings may be public or secret); JAMES HAMILTON, THE POWER TO PROBE: A STUDY OF CONGRESSIONAL INVESTIGATIONS 244-72 (1976) (Rights of witnesses are those granted in House and Senate rules; no right to confront witnesses or cross-examine them; no right to call one's own witnesses; rules of evidence do not apply). Witnesses before congressional investigations not only have no right to examine other witnesses, but they are routinely compelled to give self-incriminating testimony. See TAYLOR, *supra* note 34, at 193-95 (Because it has never been conclusively resolved whether the Fifth Amendment privilege against self-incrimination applies to witnesses before congressional investigations [because an investigation is not a "criminal case," in the language of the Fifth Amendment], the practice evolved of merely granting testimonial use immunity and ordering testimony.). There is no right to avoid embarrassment or stigma by asserting a Fifth Amendment privilege against self-incrimination before a congressional investigation after being immunized from criminal prosecution and then ordered to testify. See *Kastigar v. United States*, 406 U.S. 441 (1972). Failure to testify after being immunized is punishable as a contempt. See THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, S. DOC. NO. 103-6, at 103-05 (1996).

134. TAYLOR, *supra* note 34, at 33-34 (Historically, congressional investigations have focused on military operations); SMITH, *supra* note 8, at 176-78 (By 1951 Congress had conducted over 100 investigations involving the military departments and the armed forces.). See also 3 ANNALS OF CONG. 490-94 (1792) (The first congressional investigation involved the disastrous defeat of Army forces by Indians in the Ohio Territory).

135. See, e.g., TAYLOR, *supra* note 34, at 13-28 (Congressional investigation of defeat of forces commanded by Major General Arthur St. Clair). President Washington dispatched St. Clair's expedition to subdue Indians that had been preying on settlers in the Ohio Territory. General St. Clair was governor of the Ohio Territory and used some of his own resources to outfit the expedition. In a battle along the Wabash River, St. Clair lost half his army in three hours and his retreat turned into a rout. The incident inflamed the public against St. Clair, who claimed that he had been inadequately equipped for the expedition, with respect to both men and material. The House of Representatives appointed a select committee to investigate the incident on 27 March 1792. Before the investigation began, Jeffersonian Democrats began using the disaster as a whip against the incumbent Federalists. The politicized investigation raised many issues but failed to reach conclusions or take action. St. Clair's hope for exoneration was dashed. The incident haunted St. Clair for the rest of his life and he died under impoverished conditions due to congressional hesitation to reimburse him for his expenses. The whole St. Clair affair became entangled in Federalist/Antifederalist politics and St. Clair "was left accused but unjudged."

More recently, Rear Admiral John Poindexter and Lieutenant Colonel Oliver North were called as witnesses during hearings on the so-called "Iran-Contra Affair" in 1987. When they asserted their Fifth Amendment rights against self-incrimination, Congress compelled their testimony by a grant of use immunity. The testimony of North and Poindexter was carried live on national television and radio, replayed on news shows, and analyzed in the public media. The hearings focused on fixing individual responsibility, and were fraught with political controversy over the Reagan Administration's policy in Central America. Moreover, in December 1986, the President had already appointed a non-due process ad hoc advisory commission, the "Tower Commission," to investigate the Iran-Contra allegations. See *Report of the Congressional Committee to Investigate Covert Arms Transactions with Iran*, H.R. REP. NO. 100-433, S. REP. NO. 100-216, 100th Cong., 1st Sess. (1987); *United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *cert. denied*, 500 U.S. 941 (1991); *United States v. Poindexter*, 698 F. Supp. 300 (D.D.C.), *appeal dismissed*, 859 F.2d 216 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1004 (1989). In *United States v. Poindexter*, 698 F. Supp. at 304, the court stated:

Congress may compel witnesses to testify over their assertion of Fifth Amendment rights . . . , and it may cause a recalcitrant witness to be punished for contempt if this fails. Few formal procedures or evidentiary rules apply during this process. The power to compel testimony in aid of legislative inquiry was assumed to exist by American legislatures even before the Constitution itself was ratified, both Houses of Congress took the same view thereafter, and the Supreme Court has recognized the Constitutionality of this authority . . . sustaining this enormous nonjudicial power in spite of the obvious possibility of abuse.

The Supreme Court precedent that recognized the constitutionality of compelling an immunized witness to testify over his objection is *Kastigar v. United States*, 406 U.S. 441 (1972). See *United States v. Poindexter*, 727 F. Supp. 1488 (1989) (motion to dismiss denied on *Kastigar* grounds). The notion that reputation must be secured from public damage by strictly formal "due process" proceedings when branches of government at the highest levels investigate failures in government operations of national-level concern is a fiction that appears throughout the standing brief of the Kimmel camp, including the brief of counsel Edward B. Hanify, in which appears not one citation to legal authority. Hanify Memo, *supra* note 71.

a convening authority could proceed directly to a general court-martial without ever having conducted a formal investigation.¹³⁸

Justice Roberts compared his commission's investigation to a grand jury investigation.¹³⁹ Grand juries are convened to investigate activity and determine whether criminal charges are warranted.¹⁴⁰ Grand jury proceedings are conducted in secret; a grand jury may have nearly unlimited investigative powers; representation by counsel has not been established as a right before a grand jury; a grand jury takes evidence in secrecy; no accused has the right to cross-examine grand jury witnesses or to inspect and comment on documentary evidence presented to a grand jury; an indictment based on evidence previously obtained in violation of the Fifth Amendment right against self-incrimination is nevertheless valid;¹⁴¹ the rules of evidence do not apply at grand jury proceedings; and a grand jury's failure to return an indictment is not preclusive of subsequent attempts to obtain an indictment from other grand juries convened for that purpose.¹⁴²

136. *McGrain v. Daugherty*, 273 U.S. 135, 177-78 (1927) (ratifying "in sweeping terms" the power of Congress to inquire into the administration of executive departments and to sift charges of malfeasance). For general discussion of the broad investigative powers of Congress, see *Kilbourn v. Thompson*, 103 U.S. 168 (1881); *Barenblatt v. United States*, 360 U.S. 109 (1959). See also 9 Op. Off. Legal Counsel 60 (1985) (Congress has broad authority to conduct investigations, as long as it does not usurp executive or judicial functions); 10 Op. Off. Legal Counsel 68, 73-74 (1986).

137. Today a "formal" method of investigation must precede referral of charges to a general court-martial. UCMJ art. 32 (1994); MCM, *supra* note 113, R.C.M. 405(b), 601(d)(2). The current requirement for a "formal" investigation before charges may be referred to a general court-martial does not preclude the conduct of "informal" investigations. The rule simply provides that an "informal" method of investigation will not support the referral of charges to a general court-martial. On the basis of an "informal" investigation, a convening authority may decide to take no action in a particular case; he may decide to take administrative, non-punitive action, to commence non-judicial punishment procedures under UCMJ article 15, to refer charges to a summary or special court-martial, or to order a UCMJ article 32 investigation with a view toward referral of charges to a general court-martial. See also the discussion of general courts-martial under the sub-heading "Courts and Boards of Inquiry and Supplemental Investigations," *infra* section II(H).

138. *Humphrey v. Smith*, 336 U.S. 695, 698 (1949).

139. PHA (pt. 7), *supra* note 42, at 3267 (Justice Roberts testified: "This seemed to me a preliminary investigation, like a grand jury investigation . . .").

140. Compare the charter of the Roberts Commission—to report responsibility for derelictions. *id.* (pt. 23) at 1247.

141. See generally *United States v. Calandra*, 414 U.S. 338, 346 (1974); *Lawn v. United States*, 355 U.S. 339, 348-50 (1958); *United States v. Blue*, 384 U.S. 251, 255 n.3 (1966).

142. On these broad powers of grand juries, see *United States v. Williams*, 504 U.S. 36, 48-51 (1992); *Calandra*, 414 U.S. at 342-45.

These are sweeping, non-due process powers exercised in federal jurisdictions every day. The findings of grand juries are routinely publicized when their investigations are complete. The Roberts Commission investigation does not compare unfavorably to a grand jury investigation—a procedure one might expect a Supreme Court justice to understand, particularly one who had risen to national prominence (before his judicial appointment) as special counsel investigating the Teapot Dome Scandal.¹⁴³

As Justice Roberts stated to Rear Admiral Kimmel and to Congress, his investigation was not a trial.¹⁴⁴ Due process may be warranted at a trial where life, liberty or property interests protected by the due process clause may be deprived, but the Roberts Commission had no such power.¹⁴⁵ Advisory investigations such as those conducted by Secretary Knox and the Roberts Commission, however embarrassing, are not governed by due process procedures. Reputation is not a constitutionally protected interest.¹⁴⁶ Military commanders have no right to enjoy such investigations or to demand remedies from their collateral effects.¹⁴⁷

The findings in the Roberts Commission report are not so outrageous as to indicate a conspiracy by the members of the Commission to protect Washington by singling out Rear Admiral Kimmel and Major General Short as scapegoats, especially in light of Secretary Knox's preliminary report to the President, including admissions of unpreparedness at Pearl Harbor. Advocates for Kimmel and Short have never presented evidence of a conspiracy to frame Kimmel and Short for dereliction as scapegoats to protect the Roosevelt Administration. Advocates for Kimmel and Short do, however, continue to vilify the Roberts Commission's proceedings and its report, comparing the investigation to a trial and conviction without due

143. E.g., Peter G. Fish, *Perspectives on the Selection of Federal Judges*, 77 Ky. L. J. 545, 571 (1989).

144. See *Kimmel's Own Story*, *supra* note 46, at 156 (complaining that the Supreme Court justice had used the term "trial" in its "strictly legalistic sense."); PHA (pt. 7), *supra* note 42, at 3267 (testimony of Justice Roberts).

145. As stated by Admiral Robert Theobald, who assisted Admiral Kimmel as counsel at the Roberts Commission investigation, the commission was "a fact-finding body." THEOBALD, *supra* note 67, at 153-54. Compare *Arnheiter v. Ignatius*, 292 F. Supp. 911, 923 (N.D. Ca. 1968), *aff'd sub nom. Arnheiter v. Chafec*, 435 F.2d 691 (9th Cir. 1970) (Informal investigation into plaintiff's fitness to command "was not a trial," but "an administrative fact-finding investigation designed to provide the convening and reviewing authorities with adequate advisory information upon which to base decisions."). The charter of the Roberts Commission went no further than the provision of information and advice to the President.

146. See *infra* notes 316-20 and accompanying text.

process, as if the performance of Kimmel and Short were subject to the President's scrutiny only through the stilted medium of lawyers and rules of evidence in an adversarial hearing. Such a relationship between military superiors and subordinates would destroy the chain of command. One can only wonder whether any commanding officer would feel constrained to use such awkward adversarial procedures to apprise himself of the performance of each soldier and seaman assigned to his command, when the law clearly does not require him to do so.

E. "Dereliction of Duty"

Over the years, advocates of Kimmel and Short have attributed talismanic significance to the phrase "dereliction of duty," used in the report of the Roberts Commission to describe the failure of Admiral Kimmel and Lieutenant General Short "to consult and confer with each other respecting the meaning and intent of the warnings and the appropriate means of defense required by the imminence of hostilities."¹⁴⁸ The Kimmels have referred to this finding as a "charge" and have treated it as an accusation of criminal misconduct, if not a conviction of such conduct, in the very inscription of the three words in the Commission's report to the President.¹⁴⁹ As a matter of fact, however, the applicable military law in existence in 1941 did not recognize "dereliction of duty" as an offense.¹⁵⁰ It

147. *E.g., Chafee*, 435 F.2d 691 *aff'g Ignatius*, 292 F. Supp. at 926 (Court has no jurisdiction to review informal investigation of fitness of officer in command, his relief of command, or his failure to be promoted; nor did the court have jurisdiction to order the Secretary of the Navy to conduct a court of inquiry or other formal hearing into plaintiff's relief from command). Rear Admiral Kimmel complained years after the relevant events that naval regulations called for courts of inquiry in disaster cases. *See, e.g., Kimmel's Own Story*, *supra* note 46, at 156. Courts of inquiry are still the preferred form of investigation in disaster cases, but the regulations have never precluded other forms of investigation. The traditional preference for courts of inquiry did not create a due process right. *See Sebra v. Neville*, 801 F.2d 1135, 1142 (9th Cir. 1986):

The "fatal flaw" in petitioner's due process claim was that he had "no property interest in the regulations governing investigations When a substantive property interest does not independently exist, rules for procedural fairness do not create such an interest [R]egulations designed to assure procedural fairness in investigations do not confer or create a protected property interest.

Moreover, Navy guidance on investigations applies "down," not "up." The President's constitutional authority is not constrained by the Secretary of the Navy's regulations.

148. PHA (pt. 7), *supra* note 42, at 3299.

149. *E.g., Letter from Edward R. Kimmel & Thomas K. Kimmel to Secretary of the Navy Ball* (May 11, 1988) ("[T]he Robert's [sic] Commission convicted him without trial . . .").

was not until 1950 that Article 92 of the first Uniform Code of Military Justice included "dereliction of duty" as a court-martial offense.¹⁵¹ The applicable military law through 1950 was, for the Army, the Articles of War, and, for the Navy, the Articles for the Government of the Navy. Under the Articles for the Government of the Navy, offenses arising from deficiencies in the performance of duty were chargeable under article 8(9) as "negligence or carelessness in obeying orders" or "culpable inefficiency in the performance of duty."¹⁵² Similar offenses under the Articles of War would have been charged as violations of the general article, article 96 ("disorders and neglects to the prejudice of good order and military discipline").¹⁵³ The fact that "dereliction of duty" was not the language of a statutory court-martial offense in 1941 may not have softened its impact,

150. The press pointed out this fact at the time. See GORDON W. PRANGE, *AT DAWN WE SLEPT* 612 (1981). Subjectivists who claim the power to divine "justice" in these cases by their own lights continue to consider such annoying legal distinctions as clouding the quest for truth with "semantics and legalisms." E.g., Thomas B. Buell, *Memorandum for the Deputy Secretary of Defense: "Advancement of Rear Admiral Kimmel and Major General Short,"* NAVAL INST. PROCEEDINGS, Apr. 1996, at 99.

151. U.S. DEP'T OF DEFENSE, *LEGAL AND LEGISLATIVE BASIS: MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1951) [hereinafter *MANUAL LEGAL BASIS*], ¶ 171, at 258 (discussing UCMJ art. 92, MCM (1951) ¶ 171c (dereliction of duty): "As a specific punitive provision, this latter sub-section is new to the Army and Air Force, but has been known to the Navy as neglect of duty . . . and culpable inefficiency in the performance of duty."); Exec. Order No. 10,214 (*MANUAL FOR COURTS-MARTIAL, UNITED STATES* (1951)), ¶ 171c, at 324—the criminal offense of "dereliction of duty" after 1950 signified willful or negligent failure to perform duties, or performance of duties in a culpably inefficient manner.

152. *ARTICLES FOR THE GOVERNMENT OF THE NAVY* 8(9) (1930); *MANUAL LEGAL BASIS*, *supra* note 151, ¶ 171, at 258. See PHA (pt. 11), *supra* note 42, at 5495 (unofficial draft court-martial charges and specifications for culpable inefficiency and neglect of duty in the case of Rear Admiral Kimmel).

153. *MANUAL LEGAL BASIS*, *supra* note 151, ¶ 171, at 258:

Under the present Army and Air Force practice offenses of this nature [i.e., dereliction of duty] would be charged under Article of War 96 The third part [of Article 92, UCMJ (1950)] is directed against any person subject to the code who is derelict in the performance of his duties. As a specific punitive provision, this latter sub-section is new to the Army and Air Force

TILLOTSON, *supra* note 114, at 206.

but it was not the language of an "indictment" prepared to support prosecution.¹⁵⁴

Admiral King and Secretary Forrestal in their endorsements on the Navy Court of Inquiry, the Army Pearl Harbor Board and Secretary Stimson's final report, and the Joint Congressional Committee in its final findings all echoed the key finding of the Roberts Commission, but without the appellation of "dereliction." Although the Roberts Commission's report found some fault with the actions of officials in Washington¹⁵⁵ (a fact overlooked by those zealously committed to rehabilitation of Kimmel and Short), the full extent of that fault would not be revealed until later when more time was available for detailed investigation. In this respect, the Roberts Commission, working quickly in the aftermath of the attack without access to highly classified evidence that would later become available, produced a report that addressed its investigative precept, but was not as comprehensive as later investigations. The discovery of additional fault with other officials in later investigations, however, does not indicate that Rear Admiral Kimmel and Major General Short were blameless. Later investigations, including the findings of the Joint Congressional Committee,¹⁵⁶ added to the list of faults the Roberts Commission had found with Kimmel and Short, but characterized such faults not as "dereliction" but as failures of judgment.¹⁵⁷ The real significance of not characterizing the failings of Kimmel and Short as derelictions in later investigations is not forgiveness but the more damning implication that the commanders lacked capacity to perform at the level expected of them. Capacity wasted in inattention or culpable disregard is the gravamen of dereliction or

154. As soon as three days after the Roberts Commission report had been submitted, the press reported that the President did not intend to order courts-martial or take any other action personally. *Inquiry on Hawaii Urged in Congress*, N.Y. TIMES, Jan. 27, 1942, at 4, col. 1.

155. PHA (pt. 7), *supra* note 42, at 3299-3300.

156. Report of the Joint Committee on the Investigation of the Pearl Harbor Attack, Pursuant to S. Con. Res. 27, 79th Cong., at 252 (Letter of Transmittal from Committee Chairman and Vice-Chairman to Speaker pro tempore of the Senate and Speaker of the House, dated July 16, 1946) [hereinafter JCC].

157. See *infra* note 232.

neglect of duty.¹⁵⁸ Later investigations found, essentially, that the commanders lacked the capacity to be derelict.¹⁵⁹

To whatever extent the findings of the Roberts Commission suggested that the Pearl Harbor commanders committed criminal "dereliction" offenses, the findings of the Navy Court of Inquiry, the Army Pearl Harbor Board, together with the endorsements of the Secretaries, and the findings of the Joint Congressional Committee, stand as official "corrections" of the offensive dereliction finding.¹⁶⁰ Kimmel and Short had full opportunities to present their sides of the Pearl Harbor story at these later proceedings and to load the historical record with their versions of the facts¹⁶¹—but neither they nor anyone else in uniform has ever held ultimate power to decide what official conclusions should be drawn from these facts.

F. Retirement

Advocates of Kimmel and Short have stated on a number of occasions that the commanders were "forced into retirement."¹⁶² The record, however, reflects that both officers were retired pursuant to their own requests. According to his own testimony, Major General Short telephoned General

158. See, e.g., MCM, *supra* note 113, Pt. IV, para. 16c(3)(d) ("Ineptitude. A person is not derelict in the performance of duties if the failure to perform those duties is caused by ineptitude rather than by willfulness, negligence, or culpable inefficiency, and may not be charged under this article, or otherwise punished.").

159. E.g., PHA (pt. 16), *supra* note 42, at 2424, 2425 (ADM King: "lack of superior judgment necessary for exercising command commensurate with their rank and their assigned duties"), 2425-26 (ADM King: "lack of the superior judgment necessary for exercising command commensurate with their responsibilities."), 2427 (Navy Judge Advocate General: "failed to exercise the discernment and judgment to be expected from officers occupying their positions;" "poor quality of strategical planning"); JCC, *supra* note 156, at 252 ("errors of judgment and not derelictions of duty").

160. And it has been the official position of the Navy ever since that "the Navy does not contend that RADM Kimmel was guilty of dereliction of duty." Memorandum, Secretary of the Navy, to Deputy Secretary of Defense (4 May 1995).

161. See, e.g., Memorandum No. 5861 from PERS-00F to PERS-00X, Bureau of Naval Personnel (7 Apr. 1993). Kimmel has already had his "day in court" and no action was subsequently taken to promote him on the retired list.

Between December 1941 and January 1946 there were no less than eight different investigations into the facts surrounding the attack on Pearl Harbor. At both a Naval Court of Inquiry and before a Joint Congressional Committee RADM Kimmel was allowed to tell his side of the story. Results of these proceedings are part of the historical record.

Id.

Marshall on 25 January 1942, and asked whether he should retire, to which General Marshall responded, "Stand pat."¹⁶³ On his own initiative, Short then prepared a formal application for retirement and forwarded it to General Marshall with a personal letter, stating as follows:

I appreciate very much your advice not to submit my request for retirement at the present time. Naturally, under existing conditions, I very much prefer to remain on the active list and take whatever assignment you think it necessary to give me. However, I am inclosing [sic] application so that you may use it should you consider it desirable to submit it at any time in the future.¹⁶⁴

General Marshall informed the Secretary of War in writing on 26 January that he had spoken to General Short, that General Short had volunteered to retire, and he recommended to the Secretary that General Short's application be accepted "quietly without any publicity at the moment."¹⁶⁵ In the same letter to Secretary Stimson, General Marshall stated further that Admiral Stark had proposed to communicate Short's request for retirement to Rear Admiral Kimmel, "in the hope that Kimmel will likewise apply for retirement."¹⁶⁶ On 25 January 1942, the Commandant of the 12th Naval District at San Francisco informed Kimmel that he had been directed to relate to him that Major General Short had submitted a request

162. E.g., Flag Officer Petition, *supra* note 36, at 1 ("Kimmel and Short were forced into retirement."). Compare this near-proprietary attitude of personal attachment to public office to MILTON, *supra* note 20, at 112 ("The supremacy of the civil executive must go unquestioned When a President loses confidence in a commander, the latter should resign or be dismissed.").

163. PHA (pt. 7), *supra* note 42, at 3133.

164. *Id.* at 3134-35. The enclosed request for retirement stated, "I hereby submit my request for retirement . . . , effective upon a date to be determined by the War Department." *Id.*

165. *Id.* at 3139.

166. *Id.* In this letter Marshall also advised the Secretary that The Judge Advocate General had no objections "to the foregoing procedure."

for retirement.¹⁶⁷ Kimmel took this as a suggestion that he submit a similar request, and he did so on 26 January 1942.¹⁶⁸

In a letter to Kimmel dated 27 January 1942, Admiral Stark informed him that he had shown the Secretary of the Navy and the President "your splendid letter stating that you were not to be considered and that only the country should be considered," assuring Kimmel that "we will try and solve the problem on the basis of your letter—'whatever is best for the country.'"¹⁶⁹ In his letter to Kimmel, Admiral Stark also stated that notification of General Short's request to retire was not intended to influence Kimmel "to follow suit."¹⁷⁰ In a letter to the Secretary of the Navy, dated 28 January 1942, Rear Admiral Kimmel acknowledged that he had been "informed today by the Navy Department that my notification of General Short's request was not intended to influence my decision to submit a similar request," but he reaffirmed his request to retire.¹⁷¹

The President was informed immediately that both officers had submitted requests for retirement, and he proposed in a cabinet meeting that an announcement be made that acceptance of their requests for retirement would not bar subsequent courts-martial.¹⁷² With the concurrence of the President, Kimmel's retirement was formally accepted by letter of 16 February 1942,¹⁷³ and Short's by letter of 17 February 1942.¹⁷⁴ Rear Admiral

167. See *id.* (pt. 17) at 2727-28:

Rear Admiral Randall Jacobs, U.S.N., Chief of the Bureau of Navigation, Navy Department, Washington, D.C., had telephoned an official message to be delivered to me which stated that Admiral Jacobs had been directed by the Acting Secretary of the Navy [later discovered to have been Secretary Knox, not the Acting Secretary] to inform me that General Short had submitted a request for retirement.

168. *Id.* at 2728. The request for retirement is reproduced on page 2733 ("I hereby request that I be placed upon the retired list . . .").

169. *Id.* at 2732. Admiral Kimmel restated these sentiments in a letter to Admiral Stark on 22 February 1942: "I submitted this request [for retirement] to permit the department to take whatever action they deemed best for the interests of the country." *Id.* at 2729.

170. *Id.*

171. "I desire my request for retirement to stand, subject only to determination by the Department as to what course of action will best serve the interests of the country and the good of the service." *Id.* at 2732. See also *id.* (pt. 6) at 2561 (Rear Admiral Kimmel's testimony).

172. *Id.* (pt. 7) at 3140. See PRANGE, *supra* note 149, at 608 (quoting from Secretary Stimson's Diary). Secretary Stimson suggested to the President that non-condonation language be included in the official retirement letters ("In order that the acceptance of these requests for retirement may not be considered as a condonation of . . . offenses"). *Id.* at 3140.

Kimmel's retirement was effected under 34 U.S.C. § 381,¹⁷⁵ and Major General Short's retirement was effected under 10 U.S.C. § 943.¹⁷⁶ Both officers had submitted their applications for voluntary retirement in the face of advice that they were not required to do so, having specifically acknowledged that they were not required to do so.

Both of the letters approving the commanders' requests to retire contained the phrase "without condonation of any offense or prejudice to future disciplinary action."¹⁷⁷ The President himself had proposed similar language, and had indicated that an opinion on the exact language to be used should be obtained from the Attorney General of the United States.¹⁷⁸ The Attorney General, Francis Biddle, recommended against specific reference to courts-martial, to leave "the matter open for further action on the part of the government without stating that a particular course is planned or that any special interpretation has been placed upon the acts committed."¹⁷⁹ The Judge Advocate General of the War Department had also been consulted about the non-condonation language and he submitted detailed legal memoranda to the Chief of Staff of the Army and the Secretary of War, recounting the difficulties with immediate courts-martial,¹⁸⁰ assessing the possibility that acceptance of voluntary retirements could be construed as condonation, and analyzing the public relations aspects of various courses of action available to the government (i.e., which legally available courses of action might lead to public charges of whitewashing, and which legally available courses of action might lead to claims of persecution).¹⁸¹ The final course of action chosen left the matter open for further consideration, provided notice to the affected officers that additional

173. *Id.* (pt. 17) at 2731.

174. *Id.* (pt. 7) at 3142; *id.* (pt. 19) at 3804.

175. "When any officer of the Navy has been forty years in the service of the United States he may be retired from active service by the President upon his own application." *Id.* (pt. 17) at 2731.

176. This section provided for retirement of Army officers after 30 years of service, upon the officer's own application, in the discretion of the President. *See id.* (pt. 7), at 3142, 3146.

177. *Id.* (pt. 17) at 2731; *id.* (pt. 7) at 3142.

178. *Id.* (pt. 7) at 3140-41.

179. *Id.* at 3141-42. The Attorney General's advice to leave open the question of what specific action might be taken is exactly the kind of advice that any staff judge advocate might give his convening authority today, to ensure that the full range of discretionary options is left open until a considered decision can be made.

180. The publication of secret documents or testimony during the war, and the time and effort required of many senior officers to act as courts-martial members and witnesses, would distract from prosecution of the war. *Id.* at 3145.

action might be taken, and informed the public that future action had not been ruled out in a matter in which the public had every right to be intensely interested.¹⁸² Retired officers, as a matter of law, remain subject to recall to active duty for disciplinary action.¹⁸³ There is no legal reason why the non-condonation language could not be included in the retirement letters.

Under the law as it then existed, Kimmel retired in his permanent grade, as a Rear Admiral,¹⁸⁴ and Short retired in his permanent grade, as a Major General.¹⁸⁵ The retirements of Kimmel and Short were clearly lawful, and the permanent grades in which they retired were those provided for by the law applicable to all officers of the Navy and Army who had previously held temporary appointments to higher ranks.¹⁸⁶ Whether the Secretaries of the Navy and War Departments, the Chief of Naval Operations and Chief of Staff of the Army, or the President himself desired or encouraged the retirement of Kimmel or Short has no bearing on the legitimacy of their retirements. The retirements were voluntarily requested and

181. *Id.* at 3145-47; *id.* (pt. 19) at 3809-10. The Judge Advocate General also noted that the President had authority to summarily discharge Major General Short under Article of War 118. See TILLOTSON, *supra* note 114, at 253-56 (discussing administrative discharges and dismissal). One would expect any staff judge advocate's personal advice to his commander or client in a highly visible case to include consideration of the possible external impacts of various courses of action available.

182. The press releases are reproduced in PHA (pt. 19), *supra* note 42, at 3811 (Short) and 3815 (Kimmel). Both releases quote the non-condonation clause and indicate that charges would not be tried until the "public interest and safety would permit."

183. See *id.* (pt. 7) at 3146 (advice of the Judge Advocate General, War Department, to Secretary of War, para. 2 (citing applicable laws)); 10 U.S.C.S. § 802(a)(4) (Law. Cop. 1997) (UCMJ art. 2(a)(4)); *United States v. Fletcher*, 148 U.S. 84 (1892) (officer court-martialled four years after retirement and dismissed from the service).

184. Act of May 22, 1917, ch. 20, § 18, 40 Stat. 84, 89.

185. Act of Aug. 5, 1939, ch. 454, 53 Stat. 1214, *as amended*, Act of July 31, 1940, ch. 647, 54 Stat. 781.

186. Officials have made this point previously. See, e.g., Memorandum, Secretary of the Navy (Ball), to Secretary of Defense, subject: Request for Posthumous Promotion of Rear Admiral Husband E. Kimmel (7 Dec. 1988) ("[N]either Rear Admiral Kimmel nor any other flag officer was statutorily eligible to retire as an Admiral at the time of his retirement. For that reason, it does not appear that retirement in his permanent grade was intended as punishment."); Memorandum, First Endorsement, Chief of Naval Operations (Trost), to The Secretary of The Navy (19 Jan. 1988) (Ser 00/8U500015), *endorsing* Memorandum, Director of Naval History to The Secretary of The Navy (5 Jan. 1988) [hereinafter Trost Endorsement] ("Rear Admiral Kimmel's retirement as a two star cannot be considered punitive since it was required by the law at that time.").

effected in accordance with law. As discussed below, the President could have fired them anyway.

G. Right to a Court-Martial

Advocates for Kimmel and Short have treated the fact that they were never court-martialled as a grievance.¹⁸⁷ No one has a right to a court-martial to "clear his name."¹⁸⁸ The decision to convene a court-martial or to refer particular charges to a court-martial is highly discretionary with individual military convening authorities. A "forced" court-martial would probably be defective jurisdictionally. There are, however, two situations in which a commissioned officer may request a court-martial: in response to an order of dismissal,¹⁸⁹ and in lieu of nonjudicial punishment. In neither situation, however, is there a right to receive a court-martial.

1. Dismissals and Courts-Martial

A commissioned officer has no constitutional right to remain in the service¹⁹⁰ and may be separated involuntarily in a number of different ways, including the stigmatic order of dismissal.¹⁹¹ Dismissal of an officer from the service is a much more severe measure than subtle pressure to retire voluntarily. A formal dismissal would cause not only injury to reputation, but also deprivation of material benefits. Dismissal deprives an officer of his commission and all pay, benefits and entitlements, including

187. *E.g.*, Flag Officer Petition, *supra* note 36, at 1-2. Kimmel advocates are apparently unaware that Kimmel declined the offer of a court-martial. See *infra* note 359.

188. *Mullan v. United States*, 212 U.S. 516, 520 (1909) (holding specifically that the Secretary of the Navy is under no obligation to convene a court-martial "to clear the name of any officer").

189. CHARLES A. SHANOR & TIMOTHY P. TERRELL, *MILITARY LAW IN A NUTSHELL* 249 (1980) (A commissioned officer dismissed by order of the President may request a court-martial, but "there is no right to such a trial.").

190. See *supra* note 95.

191. 10 U.S.C.S. § 1161(a)(3) (Law. Co-op. 1997). On the Executive power of dismissal, see 4 Op. Att'y Gen. 603, 609-13 (1847); 8 Op. Att'y Gen. 223, 230-32 (1856); 17 Op. Att'y Gen. 13 (1881). Congress also has power to provide for the removal of officers. One of the great compromises made in the drafting of the Constitution was the decision to omit any clause prohibiting the existence of a standing army, allowing Congress, instead, sufficient power to "increase the Army, or reduce the Army, or abolish it altogether." *Swaim v. United States*, 28 Ct. Cl. 173, 221 (1893), *aff'd* 165 U.S. 553 (1897). See *THE FEDERALIST* No. 24, at 153 (Hamilton) (Jacob E. Cooke ed., 1961); McDONALD, *supra* note 20, at 202-03. If Congress has power to disestablish the Army and Navy altogether, which is scarcely subject to doubt, it must have power to provide for the removal of one officer at a time.

retirement pay.¹⁹² The President's power to dismiss an officer from the service, once unlimited,¹⁹³ is today, in peace time, limited (by statute) to dismissal pursuant to the sentence of a general court-martial.¹⁹⁴ Congress has not attempted, however, to abrogate the power of the President to dismiss an officer in time of war.¹⁹⁵

Today, Article 4 of the Uniform Code of Military Justice (UCMJ) provides some procedural safeguards for officers subject to presidential dismissals in time of war, including that officers dismissed by order of the President may request a court-martial.¹⁹⁶ The right to request a court-martial in such cases, however, was not provided to officers of the Army until 1950 with the enactment of the first UCMJ,¹⁹⁷ although the right to request a court-martial pre-existed the UCMJ in the Articles for the Government of the Navy.¹⁹⁸ The current UCMJ standard, adopted from the Articles for

192. See, e.g., *United States v. Ballinger*, 13 C.M.R. 465 (A.B.R. 1953) (Dismissal is officer-equivalent of a dishonorable discharge and has equivalent effect on benefits and entitlements.); *Van Zante v. United States*, 62 F. Supp. 310 (Ct. Cl. 1945); JAGJ 1953/4541 (25 May 1953); TILLOTSON, *supra* note 114, at 255 ("Summary dismissal by executive order is a separation from the service under other than honorable conditions."). See also 38 U.S.C.S. § 101(2) (Law. Co-op. 1997) ("Veteran" does not include one discharged under conditions other than honorable), and provisions throughout Title 38 U.S.C. that state the impact on various veterans' benefits of a discharge under conditions other than honorable.

193. See, e.g., *Wallace v. United States*, 257 U.S. 541, 544 (1922); *United States v. Corson*, 114 U.S. 619, 620-21 (1885); *Blake v. United States*, 103 U.S. 227, 231-33 (1881); 4 Op. Att'y Gen. 1 (1842) (advising the Secretary of the Navy that the President, as Commander in Chief, has absolute power to dismiss an officer from the service without a court-martial, notwithstanding that the exercise of such power might subject "brave and honorable men" to "capricious despotism," "deprive them of their profession" and even "sully their good name.").

194. 10 U.S.C.S. § 1161(a)(1) (Law. Co-op. 1997). A convening authority may also commute a court-martial sentence to dismissal. 10 U.S.C.S. § 1161(a)(2) (Law. Co-op. 1997). But for the statutory limitation imposed by the 1866 predecessor to 10 U.S.C.S. § 1161 (Law. Co-op. 1997) (founded upon Congress's Constitutional power to "make Rules for the Government and Regulation of the land and naval Forces"), the President could summarily dismiss an officer from the service at any time, peace or war, revoking his commission and cutting off all pay and benefits. Act of July 13, 1866, ch. 176, § 5, 14 Stat. 90, 92. See *Fletcher v. United States*, 26 Ct. Cl. 541, *rev'd on other grounds*, 148 U.S. 84 (1891).

195. The law, codified at 10 U.S.C.S. § 1161(a)(3) (Law. Co-op. 1997) specifically recognizes the President's authority to order the dismissal of an officer in time of war. See *McElrath v. United States*, 102 U.S. 426 (1880) (In time of war neither sentence of court-martial, nor any commutation thereof, is required as "condition precedent" to the President's exercise of the power of dismissal). See also CORWIN, *supra* note 33, at 187 (Congress has never attempted to limit the President's power of dismissal in time of war; that power remains absolute.); BERDAHL, *supra* note 6, at 128-29 (short legal history of President's power to dismiss officers—the power is unimpaired in time of war).

the Government of the Navy, does not provide a right to a court-martial even after the President has ordered such a harsh sanction as dismissal. "If the President fails to convene a general court-martial within six months . . . the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue,"¹⁹⁹ and "[i]f an officer is discharged from any armed force by administrative action . . . he has no right to trial under this article."²⁰⁰ Accordingly, the President may order a dismissal, ignore a demand for court-martial, and the officer will be administratively separated from the Service without a hearing after six months. Moreover, according to the law, if the President does convene a court-martial, and it acquits the officer or fails to order dismissal or death, "the Secretary concerned shall substitute for the dismissal ordered by the President a form of discharge authorized for administrative issue."²⁰¹ An officer would under no circumstances be entitled by a court-martial acquittal to restoration to his previous military position, or to any particular position in the armed forces, because the President has the sole power to appoint officers of the Armed Forces.²⁰² The limited victory

196. See 10 U.S.C.S. § 804 (Law. Co-op. 1997) (UCMJ art. 4):

If any commissioned officer, dismissed by order of the President, makes a written application for trial by court-martial, setting forth, under oath, that he has been wrongfully dismissed, the President, as soon as practicable, shall convene a general court-martial to try that officer on the charges on which he was dismissed. A court-martial so convened has jurisdiction to try the dismissed officer on those charges, and he shall be considered to have waived the right to plead any statute of limitations . . .

197. See TILLOTSON, *supra* note 114, at 255 ("An officer summarily dismissed by order of the President in time of war is not entitled to trial by court-martial."). The first Uniform Code of Military Justice added the right to request a court-martial in 1950. Act of May 5, 1950, ch. 169, § 1, 64 Stat. 110 (UCMJ art. 4).

198. ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 37, reprinted in NAVAL COURTS AND BOARDS 465, § B-39 (1937).

199. 10 U.S.C.S. § 804(b) (Law. Co-op. 1997).

200. *Id.* § 804(d). See ARTICLES FOR THE GOVERNMENT OF THE NAVY, arts. 36, 37 (1930) (same as the UCMJ).

201. 10 U.S.C.S. § 804(a) (Law. Co-op. 1997).

202. *Id.* § 804(c) ("If a discharge is substituted for a dismissal under this article, the President alone may reappoint the officer to such commissioned grade and with such rank as, in the opinion of the President, that former officer would have attained had he not been dismissed.").

achieved at a court-martial today, if one were convened, would mean only that the dismissed officer would be separated under Service regulations.²⁰³

After the United States had declared war, President Roosevelt had at his disposal the severe power of executive dismissal in time of war,²⁰⁴ and it is clear under then-existing law that Rear Admiral Kimmel and Major General Short had no right to courts-martial. Speaking of himself and Kimmel, Major General Short testified before a Joint Congressional Committee that "both Departments had the legal right to refuse us a courts-martial, if they saw fit to do so."²⁰⁵

There is one other circumstance in which the law provides that service members may request a court-martial: all officers and enlisted members who are not attached to or embarked in a vessel may refuse non-judicial punishment under Article 15 UCMJ, and request a court-martial in lieu of such proceedings.²⁰⁶ In the face of such a request, however, the convening authority may decline to pursue charges in any forum, choosing to resolve issues administratively. Article 15 does not provide a right to a court-martial.

Service members never have a right to a court-martial, only a right to request one under limited circumstances. Actions or statements that impugn the judgment or professional performance of an officer in a particular situation need not be authorized by the verdict of a court-martial or other "due process" hearing beforehand, nor do such actions or statements afterwards give rise to a right to a court-martial or other hearing to challenge or rebut them. No one in the military has or has ever had the right to demand a court-martial in lieu of an administrative investigation, to correct perceived errors in an administrative investigation, to challenge a relief from command, to ensure that the fault of others is publicly revealed,²⁰⁷ or to counteract bad publicity. If an appropriate convening authority were

203. See SHANOR AND TERRELL, *supra* note 189, at 249-50.

204. See *supra* note 195. The current statutory scheme applicable to dismissal in time of war (10 U.S.C.S. § 804 (Law. Co-op. 1997)) still affirms the extensive discretionary powers of the President over the appointment, removal and service, generally, of officers.

205. PHA (pt. 7), *supra* note 42, at 3149.

206. 10 U.S.C.S. § 815(a) (Law. Co-op. 1997) (UCMJ art. 15(a)). See MCM, *supra* note 113, pt. V, para. 4.

207. See *infra* notes 474, 481. Under the rules of evidence, the collateral misconduct of others would be inadmissible as irrelevant. A court-martial for dereliction of duty would not try the alleged derelictions or omissions of others. See MCM, *supra* note 113, MIL. R. EVID. 402. The Military Rules of Evidence are based on the Federal Rules of Evidence. The rule of relevance has ancient common law roots.

inclined to refer charges to a court-martial as a "courtesy," and the jurisdictional prerequisites for a court-martial were met, he could do so, but no officer, including Kimmel and Short, has a right to compel his own court-martial.²⁰⁸

2. *Effect of Acquittal*

A judgment of acquittal at a court-martial merely reflects the opinion of two-thirds of the members of the court-martial that the government did not prove beyond a reasonable doubt that the accused committed a criminal offense. Charges tried before a court-martial may not be referred to another court-martial after an acquittal.²⁰⁹ A court-martial acquittal, however, does not mean that the accused committed no misconduct, or that an acquitted officer was free from errors of judgment unacceptable for one in his position of responsibility, or that he is or was properly qualified for any particular position of responsibility. As stated in *Fletcher v. United States*, the military "holds its society to stricter accountability; and it is not desirable that the standard of the Army shall come down to the requirements of a criminal code."²¹⁰ Acquittal at a court-martial does not entitle an officer to restoration of privileges previously enjoyed through the President's discretion.²¹¹ A verdict that absolves one of criminal responsibility does not also deprive the Commander in Chief of the power to command.

The standard of proof at a court-martial, as in any criminal trial, is "beyond a reasonable doubt." This high evidentiary standard might produce an acquittal for want of evidence in a court-martial case where more than sufficient evidence exists to support administrative decisions not sub-

208. See *Mullan v. United States*, 42 Ct. Cl. 157, 172 (1907), *aff'd*, 212 U.S. 516 (1909) (In a case noteworthy for the personal participation of President William McKinley, the Court of Claims held that a naval officer had no right to demand that charges against him be investigated by a court of inquiry or a court-martial. The Secretary of the Navy was empowered to convene a court of inquiry or a court-martial at the request of an officer, but he also had discretion as to whether any such tribunal would be convened.).

209. 10 U.S.C.S. § 844 (Law. Co-op. 1997) (UCMJ art. 44).

210. 26 Ct. Cl. 541, 562-63 (1891), *rev'd on other grounds*, *United States v. Fletcher*, 148 U.S. 84 (1893); *Swaim v. United States*, 28 Ct. Cl. 173, 227 (1893) (quoting *Fletcher*). Certainly the same standard, that mere freedom from crime is not sufficient, applies to the most senior officers of the Navy.

211. As Admiral Carlisle Trost stated, "[I]n terms of accountability, there is a vast difference between a degree of fault which does not warrant punitive action and a level of performance which would warrant bestowal of a privilege." Trost Endorsement, *supra* note 186 (on the failure of previous administrations to nominate Rear Admiral Kimmel for advancement on the retired list).

ject to any form of adjudication.²¹² The administrative actions taken by the government with respect to Kimmel and Short could have been taken notwithstanding the existence of hypothetical courts-martial acquittals of "dereliction of duty."²¹³ Finally, any court-martial of Kimmel or Short that had followed the applicable rules of evidence would have found inadmissible evidence of the collateral fault of others in the Pearl Harbor disaster. Courts-martial, like all criminal trials, do not try whole incidents and everyone involved in them; they try specific charges against specific individuals only. The collateral fault of others is not a defense; and Kimmel and Short could not have used courts-martial as soapboxes to demand the indictment of others.²¹⁴

H. Courts and Boards of Inquiry and Supplemental Investigation

Advocates of Rear Admiral Kimmel treat the favorable findings of the Navy Court of Inquiry as tantamount to a judicial acquittal.²¹⁵ A court of inquiry is not a criminal court; such bodies may not try, acquit, or convict anyone of a criminal offense,²¹⁶ nor do they make professional personnel decisions.²¹⁷ Courts of inquiry are investigative tools²¹⁸ to assist

212. Related to this reasoning is the traditional rule that acquittal of a criminal charge does not bar subsequent civil actions for damages based on the same conduct. The same evidence that might not meet the higher standard of proof applicable in a criminal context ("beyond a reasonable doubt") might satisfy the standard of proof for liability in a civil context ("a preponderance of evidence"). In *One Lot Emerald Cut Stones v. United States*, 409 U.S. 332, 235 (1972), the Supreme Court held that a prior criminal acquittal on the underlying offense did not bar a civil forfeiture action because "the difference in the burden of proof in criminal and civil cases precludes application of the doctrine of collateral estoppel." Likewise, in *Helvering v. Mitchell*, 303 U.S. 391, 397 (1938), the Court observed that "the difference in degree in the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*." The O.J. Simpson cases are a familiar recent example of civil proceedings following a criminal acquittal.

213. In fact, even more severe administrative action could have been taken notwithstanding courts-martial acquittals. *E.g.*, 12 Op. Att'y Gen. 421, 424-26 (1868) (President had authority to disapprove findings of court-martial and dismiss officer from service notwithstanding his acquittal on charges of neglect of duty. The discretionary power of the President to dismiss is separate from the power of a court-martial to sentence an officer to dismissal.). See also *McElrath v. United States*, 102 U.S. 426, 437-39 (1880) (Presidential dismissal is valid even if based upon an erroneous understanding of predicate facts.).

214. See *infra* notes 378, 474, 481, and accompanying text. The McVay case raises this issue more directly; hence, Part III of this article develops the issue more thoroughly.

215. *E.g.*, Flag Officer Petition, *supra* note 36, at 2 ("The Court of Inquiry cleared Admiral Kimmel of any improper performance with regard to his duties . . ."); Letter from Thomas K. Kimmel to Secretary of the Navy Ball (May 11, 1988) (The court of inquiry "completely exonerated him."); Hanify Memo, *supra* note 71 (thirteen pages of argument on the findings of the court of inquiry, without citation to a single legal authority).

decision making by the authorities that convened them.²¹⁹ The principal purpose of a court of inquiry is to gather and organize information. Such a "court" may express opinions and recommendations only when specifically authorized to do so.²²⁰ A convening authority is not required to accept the findings, opinions or recommendations of a court of inquiry. Such findings, opinions and recommendations are advisory only.²²¹ If dissatisfied with the results of a court of inquiry, the convening authority may order additional investigation by the court,²²² or conduct additional investigation by other means, including single-officer investigations.²²³ The findings of a court of inquiry, being in no way a legal judgment, are not entitled to finality nor do they create some form of estoppel of the secretary's or the president's inherent investigative powers. No one has a right to a court of inquiry,²²⁴ to enforcement of its findings, or to correction of

216. NAVAL COURTS AND BOARDS 347, ¶ 720 (1937) ("The proceedings of these bodies [courts of inquiry] are in no sense a trial of an issue or of an accused person; they perform no real judicial function . . ."); EDGAR S. DUDLEY, *MILITARY LAW AND THE PROCEDURE OF COURTS-MARTIAL* 212, ¶ 459 (1910) ("The court of inquiry is not a judicial tribunal.").

217. *Rogers v. United States*, 270 U.S. 154 (1926) (Findings of military courts of inquiry merely adduce evidence and are not binding on subsequent personnel decisions—officer's discharge upheld notwithstanding favorable finding of court of inquiry.).

218. JACOBS, *supra* note 17, at 59 (Courts of inquiry "are convened to investigate a matter."); WINTHROP, *supra* note 106, at 517 (A court of inquiry is not a court; not a trial; its opinions, when given, are not judgments; it does not administer justice; its role is to "examine and inquire."). See 10 U.S.C.S. § 935(a) (Law. Co-op. 1997) (UCMJ, art. 135(a)).

219. NAVAL COURTS AND BOARDS 347, ¶ 720 (1937) (Courts of inquiry "are convened solely for the purpose of informing the convening authority in a preliminary way as to the facts involved in the inquiry . . ."); 8 Op. Att'y Gen. 335, 347, 349 (1857) (In a case involving the use of courts of inquiry to investigate the general fitness of officers of the Navy, of all grades, the Attorney General specifically rejected the notion that "the sole object of a court of inquiry is the exculpation of some officer, the individual subject of the inquiry" and clarified that "[t]he object of a court of inquiry is the ascertainment of facts for the information of superior authority." The Attorney General noted that members of the military community often mistook the "real nature" of such courts, and "their true legal relation to the Executive.").

220. NAVAL COURTS AND BOARDS 347, ¶ 720 (1937) (Courts of inquiry are fact-finding bodies and will not express opinions or make recommendations unless directed to do so in the convening authority's precept.); 8 Op. Att'y Gen. 335, 339, 342 (1857) (Courts of inquiry merely state facts and do not offer opinions unless specifically required to do so by the convening authority); BYRNE, *supra* note 109, at 258 (Opinions and recommendations are expressed in the report of an investigation only when directed by the convening authority). The same rule applies today. 10 U.S.C.S. § 935(g) (Law. Co-op. 1997) (UCMJ, art. 135(g)).

its errors. Courts of inquiry are tools for those empowered to convene them. They do not create personal rights.

A proper convening authority may appoint a court of inquiry to investigate and advise on any matter within the convening authority's responsibility. Convening authorities frequently seek from courts of inquiry recommendations with respect to personal responsibility and whether evidence would support courts-martial. A convening authority may proceed, however, to a general court-martial, or decide not to proceed to a general

221. NAVAL COURTS AND BOARDS 347, ¶ 720 (1937) (Conclusions of courts of inquiry "are merely advisory."); *Beard v. Stahr*, 370 U.S. 41 (1962) (Plaintiff's due process claim against board of inquiry and board of review dismissed as premature because the secretary had not yet exercised his discretion to approve or disapprove recommendations of the boards—such boards are merely advisory to the convening authority.); WINTHROP, *supra* note 106, at 531 (The convening authority may take action on a court of inquiry "at his discretion." "If an opinion be given, it is in no respect binding upon him, being in law merely a recommendation to be approved or not as he may determine."); DUDLEY, *supra* note 216, at 218 ¶ 476 ("The record of the court [of inquiry] when received by the convening officer may be acted upon, in his discretion, by approval or disapproval."); 4 Op. Att'y Gen. 1 (1842) (advising the Secretary of the Navy that the President has absolute, constitutional power to dismiss an officer from the service without a court-martial, notwithstanding the favorable findings of a court of inquiry). That courts of inquiry are advisory only has been the tradition from time immemorial, and it is still taught in the Navy today. *E.g.*, NAVAL JUSTICE SCHOOL, ADMINISTRATIVE LAW STUDY GUIDE, Ch. 1, para. 0101, 0103 at 1-1 (Aug. 1996) (Administrative investigations, including courts of inquiry, "are purely administrative in nature—not judicial." Such investigations are "advisory only; the opinions are not final determinations or legal judgments." Recommendations made in the report of an investigation are not binding upon convening or reviewing authorities. "Originally adopted by the British Army," the court of inquiry "has remained in its present form with only slight modifications since the adoption of the Articles of War of 1786."). *But see*, Ned Beach, *Comment*, "Reopen the Kimmel Case," NAVAL INST. PROCEEDINGS, Apr. 1995, at 27 (mistaking the 1944 court of inquiry for "a legal judgment of fault").

222. *E.g.*, DUDLEY, *supra* note 216, at 219 ¶ 476 ("If the proceedings [of a court of inquiry] are not satisfactory to him [the convening authority], he may return them for revision or further investigation . . .").

223. NAVAL COURTS AND BOARDS 347, ¶ 720 (1937) (Convening authority has discretion to decide whether to use a court of inquiry, a single-officer investigation, or a board of investigation.). Forrester's decision to order single-officer investigations by Admiral Hart and Admiral Hewitt was clearly within his lawful powers. Admiral Thomas Hart conducted his investigation pursuant to a precept of the Secretary of the Navy, dated 12 February 1944. PHA (pt. 16), *supra* note 42, at 2265. Admiral H. Kent Hewitt conducted his investigation pursuant to Forrester's precept of 2 May 1945. *Id.* at 2262. Kimmel advocates refer to these additional investigations as "ex parte inquiries," as if Kimmel had some right to stand before the Secretary of the Navy and any quest for information concerning him. *See, e.g.*, Hanify Memo, *supra* note 71, at 10 (without citation to a single legal authority).

court-martial, notwithstanding a contrary recommendation by a court of inquiry. Before 1950 a convening authority could proceed directly to a general court-martial without conducting a court of inquiry or other formal investigation.²²⁵ Under the current military justice system, a hearing that accords due process rights to an individual accused of an offense must be conducted, unless waived by the accused, before a convening authority may refer charges to a general court-martial.²²⁶ The requirement for such a hearing may be satisfied by a properly conducted court of inquiry, by an investigation conducted pursuant to Article 32 UCMJ, or by similarly "formal" proceedings.²²⁷ The findings and recommendations of a court of inquiry or Article 32 investigating officer still have no legal finality or effect of *res judicata*.²²⁸ If a convening authority is satisfied with the sufficiency of evidence, he may refer charges directly to a general court-martial contrary to the recommendations in an investigative report.²²⁹ This type of discretion afforded convening authorities in the military is inherent throughout the structure of the Uniform Code of Military Justice, and the courts have upheld it repeatedly.²³⁰

To say that the Court of Inquiry or Army Pearl Harbor Board vindicated or exonerated either Kimmel or Short and therefore entitled them to restoration of rank misstates the purpose and effect of such investigative

224. *Mullan v. United States*, 42 Ct. Cl. 157, 172 (1907), *aff'd*, 212 U.S. 516 (1909) (Naval officer had no right to demand that charges against him be investigated by a court of inquiry or a court-martial. The Secretary of the Navy had unreviewable discretion as to whether any such tribunal would be convened.); *WINTHROP*, *supra* note 106, at 521 (Exercise of the authority to order a court of inquiry is discretionary—"Neither the President nor a commanding officer is obliged to order a court under *any* circumstances.") (emphasis in original). The courts will not order that a court of inquiry or other formal investigation be conducted. *E.g.*, *Arnheiter v. Chafee*, 435 F.2d 691 (9th Cir. 1970), *aff'g* *Arnheiter v. Ignatius*, 292 F. Supp. 911, 926 (N.D. Ca. 1968) (civil court had no jurisdiction to issue mandamus to Secretary of the Navy to conduct a court of inquiry or other formal hearing into plaintiff's relief from command).

225. *E.g.*, *Humphrey v. Smith*, 336 U.S. 695, 698 (1949) (Articles for the Government of the Navy do not require that formal investigations be conducted before courts-martial). The Fifth Amendment also specifically excludes courts-martial from the pretrial requirements of the Grand Jury Clause. U.S. CONST. amend. 5.

226. 10 U.S.C.S. § 832 (Law. Co-op. 1997) (UCMJ art. 32); MCM, *supra* note 113, R.C.M. 405.

227. MCM, *supra* note 113, R.C.M. 405(b).

228. *I.e.*, "the matter has already been decided," precluding inconsistent subsequent action.

229. *E.g.*, *United States v. Schaffer*, 12 M.J. 429 (CMA 1982) (Unlike a grand jury's refusal to indict—a recommendation against prosecution in a pretrial investigation will not preclude trial by court-martial.).

bodies within the military.²³¹ The complete proceedings in both the Kimmel and Short cases included the endorsements of senior military and civilian officials, based on additional investigation and deliberation. The juridical significance of the Navy Court of Inquiry and the Army Pearl Harbor Board resides solely in the final reports of the Secretaries who convened them. The endorsements and final reports continued to find significant fault with both Rear Admiral Kimmel and Major General Short.²³²

Challenges of the legitimacy of supplemental investigations conducted by Hewitt and Clausen, at the direction of the Secretary of the Navy and the Secretary of War, have overlooked not only the standing law on investigations, but also the specific statutory charge that precipitated the Court of Inquiry and the Army Board. Both investigations were conducted pursuant to the following Congressional resolution: "The Secretary of War and the Secretary of the Navy are severally directed to proceed forthwith with an investigation into the facts surrounding the catastrophe."²³³ As clarified by Congressman Murphy at the Joint Congressional Committee hearings, Congress charged the secretaries to investigate, without pre-

230. Courts-martial convening authorities play a decisive role throughout the military justice process, including decision-making under the following rules: R.C.M. 303 (preliminary inquiry); R.C.M. 304(b), R.C.M. 305 (pretrial restraint and confinement); R.C.M. 306 (initial disposition of offenses); R.C.M. 401 (disposition of charges); R.C.M. 404 (actions available to special court-martial convening authority); R.C.M. 407 (actions available to general court-martial convening authority); R.C.M. 502, R.C.M. 503 (selection and detailing of members of courts-martial); R.C.M. 601 (referral of charges); R.C.M. 702(b) (ordering depositions); R.C.M. 704 (grants of immunity); R.C.M. 705 (negotiating and entering pretrial agreements on behalf of the government); R.C.M. 1101 (temporary deferment of sentence to confinement); R.C.M. 1107 (action on findings and sentence). See *Parker v. Levy*, 417 U.S. 733 (1974); *United States v. Solorio*, 483 U.S. 435 (1987) ("universal" courts-martial jurisdiction over military personnel).

231. As a factual matter, the Army Pearl Harbor Board did not exonerate Major General Short. The Board did, however, spread blame to General Marshall, Secretary of State Cordell Hull, and others. PHA (pt. 3), *supra* note 42, at 1450-51.

232. After considering the findings of the Army Pearl Harbor Board, in his official report Secretary of War Stimson reached conclusions regarding the responsibility of Major General Short that were, as he stated, "in general accord" with the findings of the Roberts Commission and the Army Pearl Harbor Board. *Official Report of the Secretary of War Regarding the Pearl Harbor Disaster*, Dec. 1, 1944, PHA (pt. 35), *supra* note 42, at 19. Secretary Forrestal's lengthy final report analyzed the findings of the court and the intermediate endorsements, concluding that Kimmel had not been guilty of dereliction of duty, but that Kimmel and Stark had "failed to demonstrate the superior judgment necessary for exercising command commensurate with their rank and their assigned responsibilities." *The Findings, Conclusions and Action by the Secretary of the Navy*, PHA (pt. 16), *supra* note 42, at 2429.

233. PHA (pt. 3), *supra* note 42, at 1358-59.

scribing the particular form of investigation. The secretaries chose the court of inquiry or board format, in their discretion, "as a medium for obtaining information."²³⁴ That the secretaries conducted additional investigation merely reflects their dissatisfaction with the non-binding advice they received from the Court and the Board, again, a matter entirely within their discretion.²³⁵ The Secretaries could have fulfilled the purpose of the legislation by appointing investigative committees without according "party" rights to Kimmel or Short.²³⁶ Additional informal investigation conducted in both cases did not violate any due process rights because neither Kimmel nor Short had any right to a particular form of investigation, nor were the investigations used as the basis for denying any interest protected by the Due Process Clause.

The Court and the Board, after much dispute in Congress and in the public over extending the statute of limitations, and over whether courts-martial would ever be conducted, were appropriate fora to provide advice to the Secretaries on the sustainability of courts-martial charges. The real impact of the Court and Board, understood in the proper military context, was that the Secretaries concurred in advisory recommendations against the referral of courts-martial charges. As explained above, the Secretaries could have referred charges notwithstanding such recommendations.

The core function of any administrative investigation, including courts of inquiry, is to accumulate evidence for use by a convening authority.²³⁷ The recommendations of a court of inquiry are just that—recommendations. The convening authority may give the final recommendations of a court of inquiry whatever weight he thinks they deserve, and that may be no weight at all. Advocates for Kimmel and Short have misrepresented the roles of the Navy Court of Inquiry and the Army Pearl Harbor Board.²³⁸ Such proceedings are not trials by one's peers; they are a form

234. *Id.* at 1359.

235. Secretary Stimson took the additional step of consulting the Judge Advocate General of the Army and obtaining his confirming advice before ordering supplemental investigation. PHA (pt. 35), *supra* note 42, at 12-13.

236. Indeed, the Army Board was not a full "due process" hearing on the model of a court of inquiry.

237. Other service regulations are consistent with the Navy's on this point. *See, e.g.*, AR 15-6, *supra* note 129, para. 1-5: "The primary function of any investigation or board of officers is to ascertain facts and to report them to the appointing authority."

238. *See supra* note 215 and accompanying text.

of investigation conducted for a convening authority, in these cases the service secretaries.

All of the actions taken by the government with respect to the Navy and Army hearings were proper and lawful. The Court and the Board recommended against courts-martial, and no courts-martial were convened, reflecting the concurrence of the Secretary of the Navy and the Secretary of War that evidence of criminal misconduct by Kimmel or Short was inadequate to support courts-martial. The principal findings of the Court and the Board, and the decisions of the Secretaries not to bring courts-martial charges, were released to the public,²³⁹ and detailed information of an exculpatory nature appeared in the press.²⁴⁰

I. Failure to Recommend Advancement

1. Rear Admiral Kimmel

In June 1942, Congress enacted a law "to provide for the retirement, with advanced rank, of certain officers of the Navy."²⁴¹ Specifically, the law provided that,

[A]ny officer of the Navy who may be retired while serving as the commander of a fleet or subdivision thereof in the rank of admiral or vice admiral, or who has served or shall have served *one year or more* as such commander, may . . . *in the discretion of the President*, by and with the advice and consent of the Sen-

239. Advocates for Kimmel and Short have complained that the entire records of the proceedings of the Court of Inquiry and Army Board were not released immediately (for security reasons). Again, this reflects lack of understanding of applicable law. The decision to publish investigative findings lies with the convening authority. DUDLEY, *supra* note 216, at 219 ¶ 477 (The convening authority may publish, in whole or in part, or not at all, the report and proceedings of a court of inquiry.); WINTHROP, *supra* note 106, at 531-32 (Convening authority may publish all, part, or none of a court of inquiry, as he sees fit.). Cf. 8 Op. Att'y Gen. 335, 346 (1857) ("[T]he legal authorities are unanimous that a court of inquiry may be open or close, according as the authority ordering it shall prescribe," and such courts are presumed to be closed unless an exception is specified). But see, Beach, *supra* note 221, at 27 (Secretary Forrestal "impounded the court's proceedings"—insinuating that he had acted *ultra vires*).

240. E.g., Lewis Wood, *Kimmel and Short Will Not be Tried*, N.Y. TIMES, Dec. 2, 1944, at 1, col 7; Felix Belair, Jr., *Army, Navy Report on Pearl Harbor; Marshall, Hull and Stark Censured*, N.Y. TIMES, Aug. 30, 1945, at 1, col. 1; *Pearl Harbor Summary*, N.Y. TIMES, Aug. 30, 1945, at 1, col. 2.

241. Act of June 16, 1942, ch. 414, 56 Stat. 370.

ate, when retired, be placed on the retired list with the highest grade or rank held by him while on the active list . . . [T]he President, by and with the advice and consent of the Senate, may in his discretion extend the *privilege* herein granted to such officers as have heretofore been retired and who satisfy the foregoing conditions.²⁴²

Rear Admiral Kimmel had served in a position that met the conditions of the law, but not for a full year (from 1 February 1941 through 17 December 1941).²⁴³ The legislative history associated with this 1942 enactment does not mention Rear Admiral Kimmel, nor is there evidence of any particular purpose in the one year requirement.²⁴⁴ There is no evidence that Congress designed the law to exclude Rear Admiral Kimmel. If Kimmel had served for more than one year, or if the law had provided for a shorter period of service, Kimmel would still have had no claim to advancement. He would merely have been eligible for such advancement. The law still recognized the constitutional discretion of the President to make appointments,²⁴⁵ referring to the authority provided by the law as "a privilege." No claim of right or entitlement can exist in an honorary privilege²⁴⁶ that is wholly within the President's discretion to recommend for advice and consent of the Senate.

In August 1947, Congress removed the one-year requirement in the Act of June 1942, as follows:

Any officer of the Navy who may be retired while serving in accordance with the provisions of section 413 of this Act,²⁴⁷ or subsequent to such service, may, in the discretion of the President, by and with the advice and consent of the Senate, when retired, be placed on the retired list with the highest grade or rank held by him while on the active list . . . [T]he President, by and

242. *Id.* (emphasis added). A final section of the law allowed the President to place the Commander in Chief, Asiatic Fleet, Admiral Hart, on the retired list as an Admiral without the advice and consent of the Senate.

243. Letter from the Chief of Naval Personnel to the Commanding Officer, Navy Finance Center (3 June 1958) (Pers-E24-BS:lja 5015) (RADM Husband E. Kimmel, USN-Ret, served on active duty as Admiral from 1 February 1941 through 17 December 1941).

244. 88 CONG. REC. 3177, 4016-17, 5009 (1942); S. REP. NO. 77-1277, at 47 (1942); H.R. REP. NO. 77-2184, at 77 (1942).

245. U.S. CONST. art. 2, § 2 (the "Appointment Power").

246. According to Senator Vinson, "This is an honor given them in recognition of their distinguished service, that is all." 88 CONG. REC. 5009 (1942).

with the advice and consent of the Senate, may in *his discretion extend the privilege herein granted to such officers* heretofore or hereafter retired, who served in the rank of admiral or vice admiral pursuant to the authority of section 18 of the Act of May 22, 1917.²⁴⁸

Under this Act, Rear Admiral Kimmel was eligible for consideration for advancement on the retired list to four-star rank, as an honorary privilege.²⁴⁹ In May 1948, the Department of the Navy initiated action to advance those retired officers who were eligible under the 1947 Act, but the Navy did not submit the name of Rear Admiral Kimmel.²⁵⁰ Records of the Bureau of Naval Personnel reflect that Kimmel was the only officer eligible for advancement under the 1947 Act who was not so advanced.²⁵¹

247. In other words, officers designated by the President for particular positions of importance who were also designated, and confirmed by the Senate, for service in the grades of admiral or vice admiral. Officer Personnel Act of 1947, ch. 512, §414, 61 Stat. 795, 876. "It was required that all three- and four-star officers be confirmed by the Senate—a definite departure from previous law [i.e., the 1917 Act under which Kimmel had been appointed, and the 1939/1940 Acts under which Short had been appointed]. . . . [T]he appointment of the top-most military and naval officers in the Nation should be subject to Senate approval." H.R. REP. NO. 80-640 (1947), *reprinted in* 1947 U.S. CODE CONG. SERV. 1644 (1657-58).

248. Officer Personnel Act of 1947, ch. 512, §414, 61 Stat. 795, 876 (emphasis added).

249. He had attained the rank of Admiral pursuant to an appointment under the 1917 Act, and he had "heretofore . . . retired." Notice that the 1947 Act does not provide for "restoration" of the highest grade or rank held, a term used by the Kimmel family. "Restoration" implies the resumption of a right or entitlement, an individualized "property" interest in a rank or grade that has been deprived. Service in three- or four-star grade had always been a temporary privilege. The 1947 law provided for the discretionary grant of that privileged status *de novo* to members of that class of officers who had enjoyed it previously, should the President and the Senate so choose. The honorary nature of the post-retirement promotions authorized under the 1942 and 1947 Acts is reflected in the fact that both acts specifically stated that no entitlement to increased retired pay would result from such promotions. Act of June 16, 1942, ch. 414, 56 Stat. 370 ("[N]o increase in retired pay shall accrue as the result of such advanced rank on the retired list"); Officer Personnel Act of 1947, ch. 512, § 414, 61 Stat. 795, 876.

250. Memorandum, Bureau of Naval Personnel (22 Apr. 1954) (BUPERS memo Pers-B13-leh); Memorandum from Chief of Naval Personnel (Holloway), to The Secretary of The Navy (27 Apr. 1954) (CHNAVPERS memo Pers-B13-leh) [hereinafter Holloway Memo].

251. Holloway Memo, *supra* note 250; Letter from Chief of Naval Personnel (Holloway) via Chief of Naval Operations to The Secretary of The Navy (30 July 1957) (CHNAVPERS ltr Pers-ig) [hereinafter CHNAVPERS Letter]; Memorandum from Pers-B8b-j1 to Chief of Naval Operations (24 Jan. 1967) ("The names of all eligible officers except Admiral Kimmel were submitted to the President for nomination to the Senate for . . . advancements in early 1948.").

Notwithstanding the favorable recommendations of the Chief of Naval Personnel (Admiral Holloway) in 1954 and 1957 when the subject of Kimmel's advancement was raised again, Secretary of the Navy Gates did not recommend the advancement of Rear Admiral Kimmel.²⁵² Rear Admiral Kimmel passed away on 14 May 1968.

Edward R. and Thomas K. Kimmel submitted an application to the Board for Correction of Naval Records (BCNR) on 7 April 1987, requesting "the Department of the Navy posthumously to take appropriate action pursuant to Title 10, U.S.C. § 1370(c)²⁵³ to place Rear Admiral Husband E. Kimmel on the retired list with the rank of Full Admiral (Four Stars), the highest grade in which he served when on active duty."²⁵⁴ The Board, which acts in an advisory capacity for the Secretary,²⁵⁵ recommended administrative closure of the case on 9 June 1987, on the grounds that the relief requested was not within BCNR's or the Secretary's jurisdiction.²⁵⁶ Essentially, the position taken by the Navy has been that exercise of the President's constitutionally-based discretion to make (or decline to make) appointments is not subject to compulsion as a "correction" for error or injustice.²⁵⁷ In January 1989 the Deputy Secretary of Defense rejected an appeal to forward the Kimmel BCNR matter to the President for his consideration,²⁵⁸ which was affirmed by Secretary Cheney in June 1990.²⁵⁹

Currently, there is no statute under which Rear Admiral Kimmel may be posthumously advanced.²⁶⁰ Among current laws, 10 U.S.C. § 601(a) applies to the appointment of officers *on active duty* to current military

252. Holloway Memo, *supra* note 250; CHNAVPERS Letter, *supra* note 251. The CNO's endorsement on Admiral Holloway's letter of 30 July 1957 recommended against advancement of Rear Admiral Kimmel; it stated that "[t]he question of responsibility has never been removed from controversy." Letter Endorsement, Chief of Naval Operations to The Secretary of The Navy (9 Aug. 1957) (CNO ltr Op-212/ras, Ser 4667P21) endorsing CHNAVPERS Letter, *supra* note 251. Secretary Gates wrote as follows to Senator John Cooper on 27 August 1957:

I have given the matter the most careful and sympathetic consideration, and I do not believe that it would be in the best interest of the Nation, nor in the ultimate interest of Rear Admiral Kimmel, for the Navy to recommend his advancement on the retired list. I, therefore, intend to initiate no action in this regard in behalf of the Department of the Navy.

253. This provision applies only to *current* retirements of officers who have served in three- and four-star positions by appointment under 10 U.S.C.S. § 601 (Law. Co-op. 1997), a provision enacted in 1980. Therefore, 10 U.S.C.S. § 1370(c) (Law. Co-op. 1997) by its own terms, could not have applied to Rear Admiral Kimmel.

254. U.S. Dep't of Defense, DD Form 149, Application for Correction of Military Record in the case of Rear Admiral Husband E. Kimmel (Apr. 7, 1987) (BCNR file 05382-87).

positions of command designated to carry the grade of general or admiral, and 10 U.S.C. § 1521 applies only to posthumous commissions *which would have become effective but for the death of the officer involved*.²⁶¹ The only avenue now available for the posthumous advancement of Rear Admiral Kimmel is a direct Presidential appointment, with advice and consent of the Senate, under article 2 of the Constitution.²⁶²

2. Major General Short

255. In accordance with 10 U.S.C.S. § 1552 (Law. Co-op. 1997), it is the Secretary of the Navy who "may correct any military record" of the Navy when he "considers it necessary to correct an error or remove an injustice." Except under limited circumstances that do not apply to the Kimmel case, records must be corrected, if at all, with the approval of the Secretary, acting on advice from the Board. The Board does not have authority to compel the correction of records over the Secretary's objection. See *Voge v. United States*, 844 F.2d 776, 781-82 (Fed. Cir. 1988) (The Board for Correction of Naval Records (BCNR) acts on behalf of the Secretary of the Navy); *Miller v. Lehman*, 801 F.2d 492 (D.C. Cir. 1986) (final decision made by the Secretary); Board for Correction of Naval Records, Action by the Secretary, 32 C.F.R. § 723.7 (1997) (The Secretary "will direct such action in each case as he determines to be appropriate"); 41 Op. Att'y Gen. 94, 97 (1952) (Upon a petition to correct military records for error or injustice, responsibility for determining whether circumstances constitute an "injustice" rests solely with the Secretary.). As is the case with courts of inquiry, the findings and recommendations of BCNR are advisory only. The Secretary may grant or deny relief contrary to BCNR's recommendation. 41 Op. Att'y Gen. 10, 11 (1948) (A correction board's decision has "the character of advice or counsel;" the principal authorized by law to take action is the Secretary, who need not take the action recommended by the Board). The Secretary's authority over BCNR is another example of the discretion of civil Executive Branch officials in military administrative matters.

256. Letter from Executive Director, BCNR, to Thomas M. Susman (June 9, 1987) ("[T]he appointment of officers shall be made by the President by and with the advice and consent of the Senate," a matter "not within the power either of the Secretary of the Navy or the Board for Correction of Records."). See U.S. CONST. art. 2, § 2 (Presidential appointment power). The BCNR does not have the power to exercise discretion constitutionally committed to the President. 41 Op. Att'y Gen. 10 (1948) (Appointment of officers can only be made by the President with the advice and consent of the Senate. The Board for Correction of Naval Records and the Secretary of the Navy do not have power to make an appointment as a remedy or correction.).

257. See *supra* notes 12, 13, 91 and accompanying text.

258. Memorandum, Deputy Secretary of Defense Taft, to Secretary of the Navy (19 Jan. 1989).

259. Letter from Secretary of Defense Cheney to Senator William V. Roth (June 13, 1990).

260. Letter, Deputy Assistant Judge Advocate General for Administrative Law (3 Nov. 1995) (DAJAG ltr 5000 Ser. 13/IMA1128B.95) ("We continue to find no statutory basis . . .").

261. See Letter, Deputy Assistant Judge Advocate General for Administrative Law (1 May 1987) (DAJAG ltr 1420 Ser. 132/11123/7).

In August 1947, Congress enacted a law to provide for advancement on the retired list of those officers who had served in the grade of Lieutenant General or General during World War II. The law authorized the President, in his discretion, with the advice and consent of the Senate, to advance such officers on the retired list to the highest grade held during the War.²⁶³ Like the parallel Navy provision in the same Act, no minimum time of service in grade was specified. Major General Short was eligible for consideration under the Act.²⁶⁴ In the following year, Short became eligible for advancement under a second legislative provision. In June 1948 Congress enacted the Army and Air Force Vitalization and Retirement Equalization Act, providing, in pertinent part:

Each commissioned officer of the regular Army . . . heretofore . . . retired . . . shall be advanced on the applicable officers retired list to the highest temporary *grade in which he served satisfactorily* for not less than six months while serving on active duty, as *determined by the cognizant Secretary*, during the period September 9, 1940, to June 30, 1946 . . .²⁶⁵

Major General Short had served as a Lieutenant General from 8 February 1941 to 16 December 1941, more than eleven months. On 2 December 1948, Major General Short submitted a request to the Secretary of the Army to be advanced on the retired list to Lieutenant General, under the 1948 Act.²⁶⁶ The 1948 Act did not require Presidential appointment or advice and consent of the Senate.²⁶⁷ The Judge Advocate General of the

262. See 41 Op. Att'y Gen. 56 (1956). Such constitutional appointments do not create additional pay entitlements. See also Matter of: General Ira C. Eaker, USAF (Retired) and General James H. Doolittle, USAF (Retired), B-224142, 1986 WL 64488 (Comp. Gen. Nov. 28, 1986) (Lieutenant General Ira Eaker and Lieutenant General James Doolittle were advanced to grade of General on the retired list in April 1985—military pay entitlements, however, depend on *statutory* authority); 10 U.S.C.S. § 1524 (Law. Co-op. 1997) ("No person is entitled to any bonus, gratuity, pay, or allowance because of a posthumous commission or warrant.").

263. See Officer Personnel Act of 1947, ch. 512, § 504(d), 61 Stat. 795, 888: [T]he President, by and with the advice and consent of the Senate, may in his discretion extend the privilege herein granted [i.e., retirement in the highest grade or rank held while on the active list] to officers heretofore or hereafter retired, who served in the grade of general or lieutenant general between December 7, 1941, and June 30, 1946.

264. See DAJA-AL 1991/2852 (11 Dec. 1991).

265. Army and Air Force Vitalization and Retirement Equalization Act of 1948, ch. 708, § 203, 62 Stat. 1081, 1085 (emphasis added).

266. See DAJA-AL 1990/0041 (22 June 1990).

Army advised that Major General Short was eligible for advancement to lieutenant general under the 1948 Act, "if it is administratively determined that he served satisfactorily in that grade for not less than six months."²⁶⁸ Congress left the question of "satisfactory service" to the determination of the Secretary.²⁶⁹ The Secretary of the Army did not act on this request during General Short's lifetime.²⁷⁰ General Short passed away on 3 September 1949.

On 10 August 1990, General Short's son, Walter D. Short, filed a petition with the Army Board for Correction of Military Records (ABCMR), requesting the posthumous advancement of General Short on the retired list under the Act of 1948.²⁷¹ The Army Board, an instrumentality of the Secretary, like the Navy Board, accepted jurisdiction of the case on the basis of the 1948 Act. The 1948 Act allowed the Secretary of the Army to effect advancements, in his discretion—an authority for which the Navy had no parallel. Two of the three members of the Board recommended "[t]hat all of the Department of the Army records related to this case be corrected by advancing [Major General Short] . . . to the rank of lieutenant general on the retired list."²⁷² Writing for the Secretary, however, Deputy Assistant Secretary Matthews sided with the single dissenter, finding no error or injustice, and denying the petition.²⁷³ Secretary Stone affirmed this decision in a letter to Senator Domenici, dated 2 September 1992, specifically stating his inability to find that General Short had served satisfac-

267. Congress may by law waive Senate advice and consent and vest power to appoint lesser officers in executive department heads. U.S. CONST. art. 2, § 2. See also *supra* note 91 and accompanying text.

268. CSJAGA 1949/3757 (13 May 1949); CSJAGA 1948/5133 (2 July 1948).

269. CSJAGA 1949/3757 (13 May 1949).

270. DAJA-AL 1990/0041 (22 June 1990).

271. U.S. Dep't of Defense, DD Form 149 Application for Correction of Military Record in the case of Major General Walter C. Short (10 Aug. 1990) (Docket no. AC91—08788).

272. In the Case of Major General Walter D. Short, ABCMR Docket No. AC91-08788 (Nov. 13, 1991).

273. Mr. Matthews conveyed the decision in a pair of memorandums (SAMR-RB) dated 19 December 1991, to Commander, U.S. Army Reserve Personnel Center, and to the Executive Secretary, ABCMR. Specifically finding that no error or injustice had been committed, Mr. Matthews wrote that posthumous advancement of Major General Short "would reverse the course of history as adjudged by his superiors who were in a better position to evaluate the Pearl Harbor disaster."

torily in the grade of lieutenant general for at least six months, a decision committed by law to the discretion of the Secretary.²⁷⁴

Recommendations of the Army Board for the Correction of Military Records are subject to the discretion of the Secretary of the Army,²⁷⁵ just as the recommendations of BCNR are subject to the discretion of the Secretary of the Navy. With some narrow exceptions that do not apply to this case, the Boards have no independent authority. As is the case with Rear Admiral Kimmel, Major General Short was the only general officer from

274. Letter from Secretary of the Army to Senator Pete V. Domenici (Sept. 2, 1992) (Advancement of Major General Short "would have required a conclusion by me that General Short had served satisfactorily in the grade of lieutenant general for at least six months. Absent such a determination from me, there is no authority for his advancement on the retired list. I am unable to make that determination."). On the absolute nature of the secretary's discretion in a similar case, see *Koster v. United States*, 685 F.2d 407, 413-14, 231 Ct. Cl. 301, 310-12 (1982) (Determination of satisfactory performance in temporary grade for retirement purposes was committed by law to the discretion of the secretary and could not be redetermined by the court, notwithstanding plaintiff brigadier general's assertions that "he has been made to suffer for the political and public pressures that were brought to bear on the Army" and that he was "treated harshly" as "a scapegoat."). Current law also grants the Secretary of the Navy discretion to advance a retired Navy and Marine Corps officer on the retired list to the "highest officer grade in which he served satisfactorily under a temporary appointment." 10 U.S.C.S. § 6151(a) (Law. Co-op. 1997). The retirement grade of three- and four-star officers today depends by law on the discretion of the Secretary of Defense. Act of February 10, 1996, Pub. L. No. 104-106, Div. A, Tit. V, Subtit. A, 110 Stat. 292, amended 10 U.S.C.S. § 1370(c) (Law. Co-op. 1997) by removing a provision which required officers in the grades of O-9 and O-10 appointed under 10 U.S.C. § 601 to be nominated by the President and receive Senate confirmation to retire at three- or four-star grade. Section 1370(c) now confers discretion upon the Secretary of Defense to retire such officers at three- or four-star grade, if he "certifies in writing to the President and Congress that the officer served on active duty satisfactorily in that grade." The law does not define "satisfactorily" and provides no appeal from the Secretary's determination. As Justice Story stated in *Martin v. Mott*, 25 U.S. (12 Wheat) 19, 31 (1827), "[w]henver a statute gives a discretionary power to any person, to be exercised by him upon his own opinion of certain facts, it is a sound rule of construction that the statute constitutes him the sole and exclusive judge of the existence of those facts."

275. See Army Board for Correction of Military Records (ABCMR), 32 C.F.R. § 581.3(f)(2) (1997). The record of ABCMR's proceedings is forwarded to the Secretary, "who will direct such action in each case as he determines to be appropriate." *Id.*

his era who was eligible for advancement under the 1947 and 1948 Acts, but who has not been advanced on the retired list.²⁷⁶

Some decision-making powers are committed to the Executive Branch exclusively by specific grants of authority in the Constitution, such as the power of appointments and commissions. Appointments and commissions are privileges,²⁷⁷ not remedies. Because officials charged with discretion to grant, deny, or rescind privileges do not dispense them in accord with the expectations of earnest suitors does not mean that such disappointments have been arranged through conspiracy, vindictiveness, or failure to hear and appreciate reasonable arguments. Officials who have considered the issue have believed, for one reason or another,²⁷⁸ that Rear Admiral Kimmel and Major General Short should not be advanced. Whatever reasons these officials have given, their decisions not to recommend Kimmel and Short for advancement on the retired list have been made in accordance with law.

J. Survey of Treatment of Admiral Kimmel and General Short in the Press²⁷⁹

As soon as he had finished reading the Roberts Commission report on Saturday, 24 January 1942, President Roosevelt asked if the report contained anything that would impede military operations or provide sensitive

276. The Army Center of Military History (website at <<http://www.army.mil/cmhh-pg/faq.htm>>) provided this information on Major General Short and advancement on the retired list of other World War II general officers. The Flag Officer Petition, *supra* note 36, makes the same point about Rear Admiral Kimmel and Major General Short.

277. See, e.g., *Kuta v. Secretary of the Army*, No. 76 C 1624, slip op. (N.D.Ill. Aug. 22, 1978) ("Service in the armed forces is a privilege and not a right."); *Pauls v. Secretary of the Air Force*, 457 F.2d 294, 297 (1st Cir. 1972) ("It is well-established law that military officers serve at the pleasure of the President and have no constitutional right to be promoted or retained in service and that the services of an officer may be terminated with or without reason."); *United States ex rel. Edwards v. Root*, 22 App. D.C. 419 (1903) (no right to promotion), *cert. denied*, 193 U.S. 673 (1904), *appeal dismissed*, 195 U.S. 626 (1904).

278. Some officials have stated that Rear Admiral Kimmel or Major General Short did not perform to the standard expected of officers of their seniority (e.g., Secretary of the Navy Forrestal, Secretary of the Army Stone), and others have stated that posthumous advancement is not an appropriate "remedy" for the initial failure of the Roberts Commission to spread blame among all those who bore some responsibility for the lack of preparedness at Pearl Harbor.

279. This section is not intended as a comprehensive survey of media treatment of Kimmel and Short; instead, it demonstrates by sampling that the basic arguments of advocates for Kimmel and Short have been in the public domain since the 1940s, and most of these arguments have their roots in heated party politics.

information to the enemy. Upon determining that there were no such objections to publication of the report, the President ordered that the report be released in its entirety to the press for publication in the Sunday newspapers.²⁸⁰ The headline on the front page of the *New York Times on Sunday*, 25 January 1942, read: "ROBERTS BOARD BLAMES KIMMEL AND SHORT; WARNINGS TO DEFEND HAWAII NOT HEHEDED." A sub-headline added: "Stark and Marshall Directed Hawaii Chiefs to Prepare—Courts-Martial Likely."²⁸¹

Almost immediately after the publication of the Roberts Commission's findings, the politically-charged quest for additional investigation of fault in Washington began. On 27 January, the *New York Times* reported that members of Congress of both parties had demanded a congressional investigation, asserting that officials in Washington had been remiss in failing to follow up on actions being taken at Pearl Harbor, and charging that the Army and the Navy had not coordinated properly with each other at the highest levels.²⁸² As the press reported, the debate in Congress began immediately to take on a partisan political tone.²⁸³

After the initial blaze of interest in additional investigation into responsibility for the disaster at Pearl Harbor in early 1942, mention of Rear Admiral Kimmel and Major General Short appeared from time to

280. PHA (pt. 6), *supra* note 42, at 2494; *id.* (pt. 7), at 3262, 3265-66 (Congress later directed publication of the Roberts Commission's report as a public document.).

281. James B. Reston, *Roberts Board Blames Kimmel and Short*, N.Y. TIMES, Jan. 25, 1942, at 1, col. 8. Initial reports in the German and Japanese media on the fate of Admiral Kimmel reflected an even harsher judgment of the responsibility of on-scene commanders. *E.g.*, *Nazis Cite Tokyo Report Kimmel is Ordered to Die*, N.Y. TIMES, Jan. 29, 1942, at 2, col. 5 (The German press quoted the Japanese *Times Advisor* as stating that Admiral Kimmel had been sentenced to death.).

282. *Inquiry on Hawaii Urged in Congress*, N.Y. TIMES, Jan. 27, 1942, at 4, col. 1. By the next day, a list of specific topics that many Congressmen wanted to investigate further appeared in the press, including the degree of responsibility of the Administration, and the reason messages from Washington focused on the Far East as the most likely point of attack. Arthur Krock, *Pearl Harbor Issue: Many in Congress Want Inquiry*, N.Y. TIMES, Jan. 28, 1942, at 5, col. 2.

283. *Republicans Push Inquiry on Hawaii*, N.Y. TIMES, Jan. 28, 1942, at 5, col. 1 [hereinafter *Republicans Push Inquiry*] (Representative Whittington of Mississippi told the House that Pearl Harbor "could not be permitted to rest by finding the Hawaiian area commanders derelict in their duty." He continued, "I have come to the conclusion that there also was dereliction in the War and Navy Departments." Representative Hoffman attributed blame for the losses at Pearl Harbor to President Roosevelt: "So long as we have a Commander in Chief who claims credit for all the good things, he should not shirk his responsibility and try to pass it to someone down the line.").

time in the press in 1943 and 1944 in connection with extension of the two-year statute of limitations for courts-martial.²⁸⁴ The partisan political tone of debates in Congress over courts-martial increased as the 1944 election approached, with Democrats assailing the Republicans for seeking to make a campaign issue of the evidence to embarrass the Administration, and Republicans charging that the Democrats wanted to delay potentially damaging disclosures until after the Presidential election.²⁸⁵

Information that the 1944 Army Pearl Harbor Board and Navy Court of Inquiry would clear Major General Short and Rear Admiral Kimmel began to appear in November and December 1944.²⁸⁶ Final release of the reports made front page news in August 1945, with stories reporting that the inquiries had also cited Marshall, Hull, Stark and Lieutenant General

284. *E.g., Silent on Kimmel's Case*, N.Y. TIMES, Sept. 15, 1943, at 12, col. 6; *Plans Bill for Kimmel Trial*, N.Y. TIMES, Dec. 2, 1943, at 14, col. 5; *Votes Peace Trial on Kimmel, Short*, N.Y. TIMES, Dec. 7, 1943, at 18, col. 6; *Votes Trial Time for Pearl Harbor*, N.Y. TIMES, Dec. 8, 1943, at 9, col. 1; *Firm on Post-War Trial*, N.Y. TIMES, Dec. 10, 1943, at 16, col. 7; *Defer Pearl Harbor Case*, N.Y. TIMES, May 25, 1944, at 10, col. 1; C. P. Trussell, *Both Houses Weigh Kimmel Extension*, N.Y. TIMES, May 30, 1944, at 7, col. 1; *Delay is Favored on Court-Martial*, N.Y. TIMES, June 1, 1944, at 1, col. 2; *Votes Year Delay on Kimmel Trial*, N.Y. TIMES, June 2, 1944, at 7, col. 1 ("Explaining its shift of directives from court-martial proceedings to investigations into the facts surrounding the attack, the [Senate Judiciary] committee report stated: 'Having in mind the existing critical exigencies of total war, the committee was unwilling to add to the burdens of our biggest Army and Navy officials . . .'").

285. Kathleen McLaughlin, *House Votes Trial for Short, Kimmel*, N.Y. TIMES, June 7, 1944, at 11, col. 8. Throughout the months leading up to the 1944 election, numerous articles appeared in the press reporting disputes in Congress over the Administration's fault for Pearl Harbor, and charges that the Administration was delaying courts-martial until after the election.

286. *E.g., Hints Vindication of Kimmel, Short*, N.Y. TIMES, Nov. 26, 1944, at 44, col. 3; Wood, *supra* note 240, at 1, col. 7.

Gerow for various failures.²⁸⁷ The partisans renewed their calls for additional investigation almost immediately.²⁸⁸

Kimmel declined in writing Secretary Forrestal's offer of a general court-martial, in view of the pending congressional investigation.²⁸⁹ Again, issues associated with the planned congressional investigation stimulated lively partisan debate, with accusations that Democrats on the Committee would control the proceedings.²⁹⁰ In July 1946, after months of hearings, the press described the Joint Congressional Committee's findings as exonerating Roosevelt and determining that "the overshadowing responsibility . . . lay with the Navy and Army commanders in Hawaii," Admiral Kimmel and General Short.²⁹¹

Years later, the press reported Admiral King's modification of his endorsement of the 1944 Navy Court of Inquiry, changing "dereliction" to "errors of judgment."²⁹²

Additional study of news accounts could be undertaken, but a reasonable survey of reporting in the *New York Times* indicates that reporting on Kimmel and Short in the mainstream media was fairly balanced, with little evidence of vilification of them personally.²⁹³ Newsworthy information covering developments about Rear Admiral Kimmel and Major General Short appeared in the press as matter of fact events.²⁹⁴ This is not unlike

287. E.g., Belair, *supra* note 240, at 1, col. 1. The same newspaper reproduced the full texts of the Army and Navy reports in section 2. The Kimmel family cites as a grievance the government's failure to release immediately the full reports of the Navy Court of Inquiry and the Army Pearl Harbor Board. The principal findings of the Court and Board with respect to Kimmel and Short were published immediately. See *supra* note 239 and accompanying text. The complete records could not be published immediately due to inclusion of "Magic" intelligence and the risk of compromising such cryptologic capabilities during the war.

288. Arthur Krock, *Pearl Harbor Questions, Congress is Likely to Seek More Light than Reports*, N.Y. TIMES, Sept. 4, 1945, at 4, col. 4; William S. White, *Congressional Inquiry Predicted As Bills Ask Pearl Harbor Action*, N.Y. TIMES, Sept. 6, 1945, at 1, col. 2.

289. *Kimmel Defers Bid for Court-Martial*, N.Y. TIMES, Sept. 13, 1945, at 2, col. 2 [hereinafter *Kimmel Defers Bid*].

290. C.P. Trussell, *Angry Senators Debate on 'Records' of Pearl Harbor*, N.Y. TIMES, Nov. 3, 1945, at 1, col. 6; *Hannegan Says Republicans are Trying to Smeare the Memory of Roosevelt*, N.Y. TIMES, Nov. 18, 1945, at 2, col. 5 [hereinafter *Hannegan Says*]; W. H. Lawrence, *Pearl Harbor Inquiry Enmeshed in Politics*, N.Y. TIMES, Nov. 18, 1945, pt. IV, at 5, col. 1.

291. William S. White, *Roosevelt Found Blameless for Pearl Harbor Disaster*, N.Y. TIMES, July 21, 1946, at 1, col. 2 [hereinafter *Roosevelt Found Blameless*].

292. *Modifies Blame for Pearl Harbor*, N.Y. TIMES, Nov. 11, 1948, at 3, col. 6.

the way the press treats any prominent figures. The media seem to have been most interested in the heated party rivalry between Democrats and Republicans generated by the whole course of public actions arising out of the Pearl Harbor disaster.²⁹⁵ Demands for additional inquiry into the Pearl Harbor attack appeared in the press frequently during the early 1940s, openly stating the underlying political motive of impugning the Roosevelt Administration.²⁹⁶ One report suggested that Governor Dewey might have won the 1944 Presidential election had he revealed information he possessed on U.S. code-breaking capabilities and the intelligence available in Washington not provided to the commanders at Pearl Harbor.²⁹⁷ The political dimensions of the Pearl Harbor cases were constantly before the pub-

293. To assess allegations that Rear Admiral Kimmel and Major General Short were still widely held to be solely responsible for the losses suffered at Pearl Harbor, the three service academies were requested to submit portions of any text books used to teach the event to midshipmen and cadets, and to comment on the manner in which instructors present the material. Naval Academy instructors responded that their military history survey course for all midshipmen covered too much ground to explore such issues as personal blame for Pearl Harbor; the History Department at the Academy takes no official position on responsibility for Pearl Harbor and encourages midshipmen to consider such issues for themselves. Air Force Academy instructors responded that Kimmel and Short are mentioned only briefly in an advanced course on World War II, "as links in a long chain of failure surrounding the Pearl Harbor attack." U.S. Military Academy instructors responded that their history department takes no official position on the matter and their courses do not focus on the assessment of blame for Pearl Harbor. Texts used by the U.S. Military Academy include Stephen B. Oates' *Portrait of America (from Reconstruction to the Present)* and John Keegan's *The Second World War*. The Naval Academy uses E. B. Potter's *Sea Power*; Kenneth J. Hagan's *This People's Navy*; Nathan Miller's *The U.S. Navy*; and Robert W. Love, Jr.'s *History of the U.S. Navy*. The Air Force Academy uses Larry H. Addington's *The Patterns of War Since the Eighteenth Century* and Gerhard L. Weinberg's *A World at Arms*. Inspection of relevant portions of these texts revealed that only Professor Love's text is particularly critical of Kimmel. The other texts barely mention Kimmel or Short, or include no reference to them.

294. The government also provided press releases upon the occurrence of key events. See, e.g., Navy press releases of 17 Dec. 1941 (advising of Admiral Kimmel's relief of command), 7 Feb. 1942 (announcing his application for retirement), 28 Feb. 1942 (advising of the Navy's acceptance of Kimmel's request to retire, "without condonation of any offense or prejudice to any future disciplinary action"), and 2 Oct. 1943 (advising of Navy and War Department decisions to postpone courts-martial of Kimmel and Short, and that they had waived the statute of limitations for the duration of the war). Memorandum, Director of Naval History, to Undersecretary of Defense for Personnel & Readiness (1 Nov. 1995) (memo 5750 Ser. AR/02848). Navy Department records did not include additional press releases.

295. See MARTIN V. MELOSI, *THE SHADOW OF PEARL HARBOR: POLITICAL CONTROVERSY OVER THE SURPRISE ATTACK, 1941-1946*, at xi-xii, 161-68 (1977).

296. E.g., *Hannegan Says*, *supra* note 290, at 2, col. 5; *Republicans Push Inquiry*, *supra* note 283, at 5, col. 1.

lic; Republicans were diligent to ensure this. Recent advocates for Kimmel and Short have not uncovered any political secrets hitherto denied to the public. All of the elements of their brief for the exoneration of Kimmel and Short appeared in the newspapers in the 1940s.

The publication of official information about Rear Admiral Kimmel and Major General Short reflects the politically charged world in which officers holding three- and four-star positions become involved by virtue of the visibility and public importance of such offices. Officials in high government positions are more susceptible to injuries to reputation as an inexorable consequence of holding such positions.²⁹⁸

K. Injury to Reputation and Official Immunity

Advocates of Kimmel and Short have complained that the commanders were not allowed sufficient opportunity to "clear their names" while their reputations were subjected to "stigma and obloquy" by the official report of the Roberts Commission.²⁹⁹ The normal remedy for injury to reputation is a suit for the tort of defamation.³⁰⁰ Following the basic rule of

297. *Editor Says Dewey Guarded War Data*, N.Y. TIMES, Sept. 21, 1945, at 4, col. 7 (reporting on a story published in *Life* magazine). Allegedly, Governor Dewey suggested in a campaign speech that he was aware of secret information in Washington not provided to Pearl Harbor, whereupon General Marshall visited him in person and shared the information on code-breaking with Governor Dewey in a secret meeting, challenging him that revealing it would cost American lives in the ongoing war. This visit reportedly persuaded Governor Dewey to abandon the subject in his campaign.

298. See *Arnheiter v. Random House, Inc.*, 578 F.2d 804 (9th Cir. 1978), *cert denied*, 444 U.S. 931 (1979) (Captain Arnheiter was relieved of command of U.S.S. *Vance* when senior officers concluded that he was not fit for command). See also *Secord v. Cockburn*, 747 F. Supp. 779 (D.D.C. 1990) (summary judgment against Major General Secord in defamation suit over a book alleging various illegal activities of Reagan Administration officials in Nicaragua). See generally 53 C.J.S. Libel and Slander § 93 (1987). Moreover, the United States has not waived sovereign immunity for intentional torts, such as defamation. See Federal Tort Claims Act (FTCA), codified at 28 U.S.C.S. §§ 2671 *et seq.* (Law. Co-op. 1997), particularly §§ 2680(h) ("The provisions of this chapter . . . shall not apply to . . . any claim arising out of . . . libel, slander . . ."), 2679(b)(1) (FTCA is exclusive remedy); *United States v. Smith*, 499 U.S. 160 (1991) (FTCA is exclusive even when it bars recovery); *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989) (FTCA clearly excepts defamation claims from the waiver of sovereign immunity). Section II(K) explores more fully the natural vulnerability of high officials to public discussion and criticism.

299. See *supra* note 104.

300. E.g., *Jimenez-Nieves v. United States*, 682 F.2d 1, 6 (1st Cir. 1982) (The "heartland of the tort of defamation: injury to reputation."); *Walker v. Couture*, 804 F. Supp. 1408, 1414 (D. Kan. 1992) ("Damage to one's reputation is the essence and gravamen of an action for defamation.").

common law, however, executive officers of a state or the federal government enjoy absolute immunity from suits for defamation arising out of publications or statements made within the scope of their official duties, "regardless of the existence of malice . . . improper motive, bad faith, or false statement of facts."³⁰¹ Defamatory matter subject to an absolute privilege will not support an action for defamation even if it is published maliciously and with knowledge of its falsity. A similar privilege of immunity applies to the findings of committees lawfully appointed by public authorities to make an investigation.³⁰² Findings and reports of investigative committees are immune from actions for defamation in so far as they deal with matters which are the subject of inquiry in the discharge of the investigative committee's duty. The President charged the Roberts Commission by executive order on 18 December 1941 to advise "whether any derelictions of duty or errors of judgment on the part of United States Army or Navy personnel contributed to such successes as were achieved by the enemy . . . and if so, what these derelictions or errors were, and who was responsible therefor."³⁰³ The "dereliction of duty" finding in the Roberts Commission's report would, therefore, under general principles of law, be immune from any action for defamation, since the President specifically directed that such findings be made.

The seminal Supreme Court case on official immunity is *Barr v. Matteo*,³⁰⁴ a defamation case in which the Court propounded the even broader rule that federal executive officials enjoy absolute immunity from suit for all common law torts based on acts within the "outer perimeter" of their discretionary authority.³⁰⁵ The significance of "absolute" immunity is that "The claim of an unworthy purpose does not destroy the privilege."³⁰⁶ In *Barr*, the Supreme Court upheld the absolute immunity of an acting federal agency head for the issuance of press releases that allegedly defamed agency employees. Barr, reacting to sharply critical comments made in the Senate (widely reported in the press and in the Congressional Record), and

301. See 53 C.J.S. *Libel and Slander* § 70, at 127 (1987). See also *id.* § 69, at 126 (including specifically official communications of military and naval officers). Under the Speech and Debate Clause, statements made by congressmen in session also enjoy absolute privilege (U.S. CONST. art. I, § 6), and a similar absolute privilege applies to judicial proceedings (*Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1872)). See 53 C.J.S. *Libel and Slander* § 71, at 129-30 (1987).

302. See generally 53 C.J.S. *Libel and Slander* § 82, at 154 (1987).

303. PHA (pt. 23), *supra* note 42, at 1247.

304. 360 U.S. 564 (1959).

305. *Id.* at 575.

306. *Id.* See *Howard v. Lyons*, 360 U.S. 593 (1958). Cf. *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949).

to inquiries from the media, issued a press release which identified two agency subordinates by name as culpable for potentially criminal payroll irregularities. Barr announced his decision to suspend immediately the two employees. In the subsequent defamation suit brought by the two employees, Barr raised as a defense that the issuance of the press release was protected by absolute privilege. In upholding Barr's claim of absolute privilege, the Supreme Court found that issuing press releases was standard agency practice, and that public announcement of personnel actions taken in response to a matter of widespread public interest was within the scope of an agency head's official duties.³⁰⁷ From a legal perspective, the key facts in *Barr* are on all fours with the key facts concerning government action in the *Kimmel* and *Short* cases, including the brief press releases provided by the Navy.³⁰⁸ The Court found that Barr was entitled to absolute immunity from a defamation action for publication of information on the agency's actions. Recognizing the implications of denying a remedy for defamation by executive officials, the Court added: "To be sure, there may be occasional instances of actual injustice which will go unredressed, but we think that price a necessary one to pay for the greater good."³⁰⁹

Behind the common law concept of official immunity lies the belief that the public interest in information about government actions, and the need of public officials to act and speak decisively without fear of lawsuits, support an efficiency-based privilege accorded to statements public officials make in the execution of their duties. The Supreme Court in *Barr* specifically contemplated that harm to reputation might be done under a rule of absolute immunity and embraced the traditional common law of immunity as the law of the land notwithstanding.³¹⁰ Supporting the public policy served by the common law, the *Barr* Court upheld official immunity on the grounds that government officials should be free to perform their duties and exercise the discretion pertinent to their offices "unembarrassed by the fear of damage suits—suits which would consume time and energies which would otherwise be devoted to governmental service, and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government."³¹¹ The Court stated this rationale for official immunity as strongly the previous century in *Spalding v. Vilas*,³¹² like *Barr*, a defamation case. The defendant official in *Spald-*

307. *Barr*, 360 U.S. at 574-75.

308. See *supra* note 294.

309. *Barr*, 360 U.S. at 575.

310. See also *Expeditions Unlimited v. Smithsonian Inst.*, 184 U.S. App. D.C. 397, 566 F.2d 289, 291 (D.C. Cir. 1977) (Defamation case applying the rule from *Barr*).

311. *Barr*, 360 U.S. at 571.

ing v. Vilas was a postmaster, and in *Barr*, the Acting Director of the Office of Rent Stabilization. Within the rational framework applied by the Supreme Court, the public interest in ensuring that military command is "fearless, vigorous, and effective," and not encumbered with lawsuits over discretionary decisions, is particularly compelling—and that interest is most compelling in the case of command decisions made by the Commander in Chief in time of grave national crises.

The Supreme Court later held in *Butz v. Economou*³¹³ that federal officials enjoyed only a qualified, good-faith immunity from suits for constitutional torts (known as *Bivens* actions),³¹⁴ but it seemed to have left intact the *Barr* rule of absolute immunity for all common law torts, including particularly defamation.³¹⁵ The Court then clarified in *Paul v. Davis* that defamation, even if it produces stigma or injury to reputation, does not rise to the level of a constitutional tort unless the defamation deprives some other constitutionally protected "liberty" or "property" interest.³¹⁶ As stated by one lower federal court, "Defamation or injury to reputation, while actionable in tort, is insufficient to invoke procedural due process guarantees."³¹⁷ More recently, the Court suggested in *Siebert v. Gilley*³¹⁸ that "no consequences, however grave, resulting from a loss of reputation can make defamation actionable as a constitutional tort."³¹⁹ Other lower federal courts have read *Siebert* as holding squarely that defamation is never cognizable as a constitutional tort.³²⁰

In other cases in which plaintiffs might establish the commission of constitutional torts, the Supreme Court did not leave government officials

312. 161 U.S. 483, 498-99 (1896).

313. 438 U.S. 478 (1978).

314. Suits for constitutional torts are referred to as "*Bivens* actions" for the seminal case, *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971) (suit for money damages arising out of a search that was held violative of the Fourth Amendment).

315. See, e.g., *Queen v. Tennessee Valley Auth.*, 689 F.2d 80 (6th Cir. 1982), cert. denied, 460 U.S. 1082 (1983); *Bush v. Lucas*, 647 F.2d 573 (5th Cir. 1981), aff'd, 462 U.S. 367 (1983); *George v. Kay*, 632 F.2d 1103 (4th Cir. 1980), cert. denied, 450 U.S. 1029 (1981); *Sami v. United States*, 617 F.2d 755, 768 (D.C. Cir. 1979); *Granger v. Marek*, 583 F.2d 781, 784-85 (6th Cir. 1978).

316. See *Paul v. Davis*, 424 U.S. 693, 701, 707-12 (1976) (respondent's photograph included in publicly distributed flyer of alleged "active shoplifters"). See *Binstein v. Fahner*, No. 81-C-1444, slip op. (N.D. Ill. July 6, 1982).

317. *Warmus v. Hank*, No. 5:92-CV-15, 1993 U.S. Dist. LEXIS 6855, at 8 (W.D. Mich. Mar. 31, 1993).

318. 500 U.S. 226 (1991).

319. *Mahoney v. Kesery*, 976 F.2d 1054, 1061 (7th Cir. 1992) (construing *Siebert v. Gilley*).

fully exposed to distracting, harassing law suits. The Court supplemented *Butz v. Economou* by expounding the principle of "qualified immunity" for constitutional torts in *Harlow v. Fitzgerald*.³²¹ The doctrine of qualified immunity, as explained in *Harlow*, shields government officials from personal suits based on exercise of their discretionary authority "insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable person would have known."³²² To meet this test, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."³²³ In a defamation case the *Harlow* qualified immunity inquiry is likely never to be reached, since *Siegert v. Gilley* also requires that the existence of a constitutional violation be established as the threshold inquiry in any *Bivens* suit, and the courts have found repeatedly that defamation does not rise to the constitutional level. In a hypothetical constitutional defamation suit that could mount the forbidding *Siegert* hurdle, *Harlow* and progeny would still most likely provide immunity because defamation, given the fulsome precedents against its constitutional status, would not violate "clearly established . . . constitutional rights of which a reasonable person would have known."³²⁴

In *Westfall v. Erwin*,³²⁵ a case involving a warehouse injury, the Supreme Court clarified that absolute immunity principles from *Barr v. Matteo* did not apply to *all* common law torts, holding, consistent with the common law, that absolute immunity would be available only for the exercise of decision-making discretion by government officials.³²⁶ Congress

320. *E.g.*, *Kelly v. Borough of Sayreville*, 107 F.3d 1073 (3d Cir. 1997) ("[T]here is no constitutional liberty interest in one's reputation and . . . a claim that is essentially a . . . defamation claim cannot constitute a claim for violation of one's federal constitutional rights."); *Smith v. Morgan*, No. 96-1445, 1997 U.S. App. LEXIS 3106 (4th Cir. Feb. 21, 1997); *Rohan v. ABA*, No. 95-7601, 1996 U.S. App. LEXIS 2903 (2d Cir. Feb. 21, 1996); *Williams v. Horner*, No. 95-3811, 1996 U.S. App. LEXIS 14489 (6th Cir. May 13, 1996); *Schwartz v. Pridy*, 94 F.3d 453 (8th Cir. 1996); *Steele v. Cochran*, No. 95-35373, 1996 U.S. App. LEXIS 14648 (9th Cir. May 20, 1996); *Moore v. Agency for Int'l Dev.*, 80 F.3d 546 (D.C. Cir. 1996). *Siegert* may have modified *Pauls v. Davis* by removing the ambiguity in attempting to determine what other interest coupled with defamation might be sufficient to rise to the constitutional level—after *Siegert* defamation is simply out of the constitutional calculus. *See also Valmonte v. Bane*, 18 F.3d 992, 1001 (2d Cir. 1994) (establishment of a due process liberty interest requires "much more than a loss of employment flowing from the effects of simple defamation").

321. 457 U.S. 800, 817-18 (1982).

322. *Id.*

323. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

324. *Harlow*, 457 U.S. at 817-18.

325. 484 U.S. 292 (1988).

responded to *Westfall* immediately by enacting the Liability Reform Act of 1988, an amendment to the Federal Tort Claims Act (FTCA).³²⁷ The Liability Reform Act "established the absolute immunity for Government employees that the Court declined to recognize under the common law in *Westfall*."³²⁸ The Act conferred such immunity on individual government employees by making an action against the United States under the FTCA the exclusive remedy for common law torts committed by government employees in the scope of their employment.³²⁹ In other words, the law substituted the United States as defendant for all federal officials sued in their individual capacity. The Supreme Court has held that government employees enjoy absolute immunity from common law tort actions under the Liability Reform Act even where the FTCA does not provide a remedy or where the government has a defense that precludes relief.³³⁰ The FTCA preserves absolute official immunity for the whole range of defamation-related torts, and indicates clearly that the government has also not waived sovereign immunity to allow such suits against the United States as a party. As stated in the Act,³³¹ "The provisions of this chapter . . . shall not apply to . . . any claim arising out of . . . malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit . . ."³³² The Liability Reform Act did exclude *Bivens* actions from the scope of the absolute official immunity it conferred, leaving the high hurdle of the *Butz*, *Harlow*, and *Siebert* line of cases undisturbed.³³³ Essentially, individual public officials may not be sued for defamation; the government may not be sued for defamation.

Developing from the common law in effect during the service of Kimmel and Short, the law has erected in the last forty years even more substantial hurdles to lawsuits against government officials based on stigma or injury to reputation caused by allegedly defamatory statements. When an official makes negative statements about an individual in the course of exercising the discretion attendant upon his duty, even if he makes such statements with intentional malice, the law will usually bar relief. The counterpart concept to the extensive immunity of government officials for

326. See *Barr v. Matteo*, 360 U.S. 564, 573 (1959).

327. Codified at 28 U.S.C.S. § 2671 (Law. Co-op. 1997).

328. *United States v. Smith*, 499 U.S. 160, 163 (1990).

329. 28 U.S.C.S. § 2679(b)(1) (Law. Co-op. 1997).

330. *Smith*, 499 U.S. at 165-67.

331. See 28 U.S.C.S. § 2680(h) (Law. Co-op. 1997).

332. See *Aviles v. Lutz*, 887 F.2d 1046 (10th Cir. 1989) (defamation claims clearly excepted from waiver of sovereign immunity in FTCA).

333. 28 U.S.C.S. § 2679(b)(2) (Law. Co-op. 1997).

defamation is the consequent vulnerability of individuals to reputation injury caused by government officials. This is the balance public policy has struck and implemented through law.³³⁴ Individuals who put themselves in a position to be judged and commented upon by government officials should be aware of their heightened vulnerability. Military officers in particular serve in an environment where this vulnerability should be apparent. They control the most dangerous artificial forces on earth; they are responsible for the security of the nation; and at the three- and four-star level they are within but a few degrees of the President of the United States in the chain of command.

The Supreme Court has ruled that the scope of qualified official immunity for constitutional torts is greater as the scope of official discretion increases, as the responsibilities of allegedly offending public officials increase—the more senior the more immune.³³⁵ The President himself enjoys absolute and permanent (i.e., surviving his term of office) immunity from civil suits for all “acts within the ‘outer perimeter’ of his official responsibility,” whether an alleged wrong is characterized as a constitutional tort or a common law tort.³³⁶

The principles of official immunity and sovereign immunity are not new. The doctrine of official immunity is part of a highly articulated common law that dates back to English law before the Revolution.³³⁷ Anyone who seeks or accepts an office exposed to comment, evaluation or discretionary decisions by senior government officials should be aware of the obvious conditions of such service. Common law defamation suits against

334. See Dean J. Spader, *Immunity v. Liability and the Clash of Fundamental Values*, 61 CHI.-KENT L. REV. 61, 66 (1985) (Correlative of official immunity is disability of individuals who might bring suit as plaintiffs—immunity is a form of “right” held by a government official; immunity is a standing “trump.”).

335. *Harlow v. Fitzgerald*, 457 U.S. 800, 806-08 (1982); *Nixon v. Fitzgerald*, 457 U.S. 731 (1982); *Butz v. Economou*, 438 U.S. 478, 511-12 (1978).

336. *Nixon*, 457 U.S. at 756. See Brief for the United States as Amicus Curiae in Support of Petitioner, *Clinton v. Jones* (No. 95-1853) (Aug. 8, 1996) (on writ of certiorari issued to the United States Court of Appeals for the Eighth Circuit).

337. See *Nixon*, 457 U.S. at 747-50 (“[O]ur immunity decisions have been informed by the common law.”); *Butz*, 438 U.S. at 508; *Spalding v. Vilas*, 161 U.S. 483, 492-98 (1896). See also 3 STORY, *supra* note 2, § 1563, at 418-19 (“The president cannot . . . be liable to arrest, imprisonment, or detention, while he is in the discharge of the duties of his office; and for this purpose his person must be deemed, in civil cases at least, to possess an official inviolability.”). See generally RESTATEMENT (SECOND) OF TORTS § 895D (1979) (immunity of public officers); W. KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 1059-60 (5th ed. 1984).

such government officials are absolutely barred, and defamation of even hypothetically constitutional dimensions is generally not actionable. To draw in the "circle of immunity" even tighter, the Supreme Court has held that *military* personnel in particular may not bring *Bivens* constitutional actions for injuries incident to service,³³⁸ and the *Feres* Doctrine bars all suits by military personnel under the Federal Tort Claims Act, even where the Act has not already barred suits, as it has for defamation, malicious prosecution and related torts.³³⁹ The significance of the regime of immunity law applicable to defamation of military officers by other government officials is that military officers have no right to vindicate reputation under such circumstances, no right to be free of "stigma" resulting from action within the outer perimeter of the scope of discretion accorded senior federal officials in the execution of their duties.

Under principles of official immunity and sovereign immunity embedded in federal law, the findings of the Roberts Commission and all of the other investigations into the Pearl Harbor attack, and official actions and statements of President Roosevelt, Secretary Knox, Secretary Stimson, Secretary Forrester, Admiral King, General Marshall, and other key government officials would be absolutely privileged against any legal remedy for defamation, even if such statements, hypothetically, were known to be false when made.

L. Media Exposure of Public Officials and Public Figures

The common law of defamation has long provided public officials, including military officers, a diminished degree of protection from criticism by the public.³⁴⁰ In *New York Times v. Sullivan*³⁴¹ the Supreme Court recognized special First Amendment concerns with suits for defamation against private defendants by public officials, erecting a substantial additional hurdle of proof for public official plaintiffs—the demonstration of "actual malice."³⁴² The *New York Times* case represents a shift in the common law balance of interests even farther away from the aggrieved individual public official to the greater values to be preserved in freedom of

338. *Chappell v. Wallace*, 462 U.S. 296 (1983); *United States v. Stanley*, 483 U.S. 669 (1987).

339. *Feres v. United States*, 340 U.S. 135, 146 (1950) ("[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."). See *Chappell*, 462 U.S. at 299 (*Feres* doctrine based on the corrosive effect lawsuits would have on military discipline).

340. See 53 C.J.S., *Libel and Slander* § 70, at 127 (1987).

341. 376 U.S. 254 (1964).

speech about government, unencumbered by fear of lawsuits. The Court in *New York Times* recognized that debate on public issues might well include "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."³⁴³ The Court intended to deter "libel suits brought by public officials who objected to criticisms of their official conduct."³⁴⁴ One study estimated that only ten percent of public-figure defamation plaintiffs prevail under the actual malice rule.³⁴⁵ The principles relied upon in the *New York Times* case trace back to the founding of the nation³⁴⁶ and have been reaffirmed by the Supreme Court in cases of extreme criticism and tasteless satire.³⁴⁷

A modern case illustrative of the diminished defamation protection afforded military officials is *Arnheiter v. Random House*.³⁴⁸ Captain Arnheiter, relieved of command of a naval vessel by superior officers who believed him unfit for command, sued for defamation the author and publisher of a book on the incident, *The Arnheiter Affair*. Affirming the trial court's summary dismissal of Arnheiter's claim, the circuit court observed that,

The commanding officer of a United States Navy vessel during war is in control of governmental activity of the most sensitive nature. Such a person holds a position that invites public scrutiny and discussion and fits the description of a public official under *New York Times* . . . Arnheiter's removal from command of a war vessel implicated critical issues of public concern, i.e.,

342. Under the "actual malice," standard, adapted from the common law standard of "malice,"

One who publishes a false and defamatory communication concerning a public official or public figure in regard to his conduct . . . [or] fitness . . . is subject to liability, if, but only if, he (a) knows that the statement is false and that it defames the other person, or (b) acts in reckless disregard of these matters.

Plaintiff's proof of these elements of liability must meet the higher evidentiary standard of "clear and convincing evidence." RESTATEMENT (SECOND) OF TORTS § 580A (1977).

343. *Sullivan*, 376 U.S. at 270.

344. Nicole B. Casarez, *Punitive Damages in Defamation Actions: An Area of Libel Law Worth Reforming*, 32 DUQ. L. REV. 667, 692 (1994) (Court's intention to deter libel suits by spawning "a litigation system in which few public figure libel plaintiffs could prevail on the merits."); Seth Goodchild, Note, *Media Counteractions: Restoring the Balance to Modern Libel Law*, 75 GEO. L. J. 315, 333 (1986).

345. R. BEZANSON ET AL., *LIBEL LAW AND THE PRESS* 122 (1987).

346. See *Sullivan*, 376 U.S. at 269-77.

347. *E.g.*, *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988).

348. 578 F.2d 804 (9th Cir. 1978).

military decision-making in the conduct of war, and the selection of those entrusted with our national defense. Arnheiter did much more than seek reversal of his removal. He used every conceivable effort to gain public exposure and to make his case a 'cause celebre'. . . . Under these conditions, we hold that Arnheiter qualifies under both the public official and public figure³⁴⁹ tests and that the book must be judged against the *New York Times* standard of actual malice.³⁵⁰

The reasoning of the *Arnheiter* court applies with even greater force to Rear Admiral Kimmel and Major General Short, the commanders who presided over forces destroyed at Pearl Harbor, and one of them the second ranking officer in the Navy.

Government, like the military, is not an abstract, autonomous entity; it consists of people. Criticism of government necessarily includes criticism of people and their actions. As the Court stated in *Garrison v. Louisiana*, "Of course any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed."³⁵¹ In fact, there is substantial authority that aggressive media reporting on high officials better serves the public and may even be fundamental to the maintenance of a free society; accordingly, the courts have been particularly cautious to protect critical statements about the highest government officials.³⁵²

Under a separate principle of common law, accurate reports of official governmental proceedings (such as officer personnel actions and the find-

349. *E.g.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974) (Public figures are "those who assume special roles of prominence in society" or who "thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."); *Curtis Pub. Co. v. Butz*, 388 U.S. 130 (1967) (seminal "public figure" case). Public figures are subject to the same "actual malice" standard as public officials.

350. *Arnheiter v. Random House*, 578 F.2d 804, 805-06 (9th Cir. 1978); *see also* *Arnheiter v. Sheehan*, 607 F.2d 994 (2d Cir. 1979).

351. *Garrison v. Louisiana*, 379 U.S. 64, 76 (1964).

352. *See, e.g.*, *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) ("Criticism of government is at the very center of the constitutionally protected area of free discussion. Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized."); *Garrison*, 379 U.S. at 76 ("The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants."); *New York Times v. Sullivan*, 376 U.S. 254, 273-80 (1964).

ings of investigations, such as the Roberts Commission investigation) enjoy immunity from suits for defamation.³⁵³ Publication of such reports by the media is also privileged.³⁵⁴

Vulnerability to public scrutiny and criticism, some of which may be half-truths, misinformation, satire, or inartful fiction, inheres in high public office. That the law so clearly leaves the reputations of public officials vulnerable to criticism by other officials and the media is one of the conditions under which public offices are held. This greater vulnerability of reputation to significant injury does not somehow "amend" the Constitution by altering in some compensating way the powers of the President and his deputies. The Commander in Chief may investigate, relieve, reassign or prosecute flag and general officers notwithstanding the inevitability of public interest. The law does not make exceptions for the thin-skinned or for those who fail to anticipate their potential exposure to embarrassment after a long career in a semi-closed society in which respect is mandated by criminal law. The alleged injury to Rear Admiral Kimmel's and Major General Short's reputations would not be remediable under the law that applies to others similarly situated. As the Supreme Court suggested in *New York Times v. Sullivan*, the law that protects reputation assumes that high public officials should be treated as "men of fortitude, able to thrive in a hardy climate."³⁵⁵

M. Official Actions Have Already Provided the Remedy

Kimmel's counsel, Charles B. Rugg, stated publicly that the Navy Court of Inquiry, including the comments of Secretary Forrester, had cor-

353. See, e.g., *Phillips v. Evening Star Newspaper Co.*, 424 A.2d 78, 88-89 (D.C. 1980), cert. denied, 451 U.S. 989 (1981) (cited with approval in *White v. Fraternal Order of Police*, 909 F.2d 512, 527 (D.C. Cir. 1990) and *Secord v. Cockburn*, 747 F. Supp. 779, 783 (D.D.C. 1990)). Cf. Annotation, *Libel and Slander: Proceedings, Presentments, Investigations, and Reports of Grand Jury as Privileged*, 48 A.L.R.2d 716 (1956). The accuracy qualification applies to the accuracy of the recordation of the allegedly defamatory material (such as the accuracy of the transcription of finding 17, the dereliction finding, in the Roberts Commission report); the qualification does not apply to the underlying fact-accuracy of the governmental findings or proceedings themselves.

354. E.g., *Secord*, 747 F. Supp. at 783 (ruling against Major General Richard Secord in his defamation suit against various authors and publishers for publication of a book critical of his role in the "Iran-Contra Scandal," the court noted that "passages will not be actionable if subject to certain common-law privileges" including "the privilege for publication of accurate reports of official governmental proceedings.").

355. *Sullivan*, 376 U.S. at 273.

rected the Roberts Commission's finding of dereliction, reported in the press as follows:

Kimmel Cleared, Says Lawyer

BOSTON, Dec. 1—Charles B. Rugg, counsel for Rear Admiral Husband E. Kimmel, declared here tonight that "the statement of Secretary of the Navy Forrestal means that Admiral Kimmel has been cleared" of charges of dereliction of duty at Pearl Harbor.³⁵⁶

President Truman, after reading the 1944 Army and Navy Pearl Harbor reports, stated publicly that the whole country shared in the blame for the disaster at Pearl Harbor, given the widespread resistance to preparations for war.³⁵⁷ President Truman also stated that he had no intention of ordering courts-martial for any of the officers involved in the Pearl Harbor disaster, but that he would "see to it that any one of them could have a fair and open trial if they wanted one."³⁵⁸ Rear Admiral Kimmel, however, declined a court-martial in writing to Secretary Forrestal, deferring to the pending congressional investigation,³⁵⁹ arranged largely, or so Kimmel claimed, through the efforts of his counsel, Charles Rugg.³⁶⁰

The Joint Committee on the Investigation of the Pearl Harbor Attack (JCC) completed its final report on 16 July 1946³⁶¹ and provided it to the press immediately.³⁶² The Congressional report clearly did not single out Kimmel and Short to bear all of the blame for Pearl Harbor.³⁶³ Major General Short issued a statement from his home in Texas indicating his satisfaction at the conclusion of the hearings: "I am satisfied that the testimony presented at the hearings fully absolved me from any blame and I believe such will be the verdict of history. As I have stated before, my conscience is clear."³⁶⁴

Dissatisfied with the results of the JCC hearings, however, Rear Admiral Kimmel blamed political intrigue by the Democrats, Committee

356. N.Y. TIMES, Dec. 2, 1944, at 5, col. 6.

357. Felix Belair, Jr., *Truman Says Public Must Share Blame for Pearl Harbor*, N.Y. TIMES, Aug. 31, 1945, at 1, col. 1.

358. *Id.*

Counsel (William D. Mitchell), Presidential orders issued by the Truman administration,³⁶⁵ Committee staff prejudiced in favor of the administration, and failure of the congressional committee to call all of the witnesses that he, Rear Admiral Kimmel, had determined that it should call.³⁶⁶ After months of hearings and thousands of pages of testimony and exhibits, col-

359. *Kimmel Defers Bid*, *supra* note 289, at 2, col. 2. In a letter to Rear Admiral Kimmel dated 28 August 1945, Secretary Forrestal wrote: "I am disposed to order your trial by General Court-Martial in open court in the event that you still desire to be so tried." PHA (pt. 19), *supra* note 42, at 3944. Kimmel responded: "In view of the agitation for a Congressional Investigation before Congress reconvened and the action of the Senate in ordering a joint Congressional Investigation of Pearl Harbor, I wish to defer my reply to your letter of August 28, 1945 until that investigation is completed." *Id.* at 3943. On advice of counsel, Charles Rugg, Kimmel had previously declined to participate in the Hart Investigation (104 CONG. REC. app. A6997 (Aug. 5, 1958); *Kimmel's Own Story*, *supra* note 46, at 157), in which Secretary of the Navy Knox had ordered Hart to afford Kimmel "the right to be present, to have counsel, to introduce, examine, and cross-examine witnesses, to introduce matter pertinent to the examination and to testify or declare in his own behalf at his own request." PHA (pt. 26), *supra* note 42, at 4. On advice of counsel, Kimmel made a tactical decision in both instances to forego opportunities for enhanced "due process." Despite these rejected opportunities, Kimmel and his counsel continued to complain later about "star chamber" proceedings that did not afford him basic "due process" rights. During the War, Kimmel himself admitted that a public court-martial would have been damaging to the war effort. *Asks Trial At Once For Pearl Harbor*, N.Y. TIMES, Oct. 12, 1943, at 11, col. 1 (Representative Cole, New York Republican, demanded immediate courts-martial; Admiral Kimmel stated, "I realize that a court-martial at this time could only be had at the expense of the war effort because of the resulting interferences with the very important duties of essential witnesses of high rank . . .").

360. *Kimmel's Own Story*, *supra* note 46, at 159.

361. JCC, *supra* note 156.

362. E.g., William S. White, *Disaster Onus Put on Kimmel, Short*, N.Y. TIMES, July 16, 1946, at 1, col. 3 [hereinafter *Disaster Onus*]; *Roosevelt Found Blameless*, *supra* note 291, at 1, col. 2.

363. E.g., "While the primary responsibility for the severe initial defeat suffered by the United States at Pearl Harbor is put in the majority report upon Rear Admiral Husband E. Kimmel . . . and Maj. Gen. Walter C. Short, in Army command at Hawaii, the War and Navy Departments do not escape censure." *Disaster Onus*, *supra* note 362, at 1, col. 3, & at 2, col. 4.

364. *Short Reiterates Stand*, N.Y. TIMES, July 21, 1946, at 12, col. 6.

365. Kimmel did not identify the presidential orders to which he took exception. President Truman did specifically direct in a series of memoranda that all information material to the investigation be provided to the Committee, including information relating to cryptanalytic activities, and that any witnesses with relevant information come forward. See JCC, *supra* note 156, app. C, at 285-87. The Joint Congressional Committee considered all of the various intelligence matters which had not been provided to Kimmel and Short before the attack at Pearl Harbor, but which had been available in Washington.

366. *Kimmel's Own Story*, *supra* note 46, at 159 (referring, in the concluding sentence, to authorities in Washington as "criminal").

lected in forty full-sized, bound volumes, the JCC still found that the Hawaiian commands bore the principal fault, by failing:

(a) To discharge their responsibilities in the light of the warnings received from Washington, other information possessed by them, and the principle of command by mutual cooperation.

(b) To integrate and coordinate their facilities for defense and to alert properly the Army and Navy establishments in Hawaii, particularly in the light of the warnings and intelligence available to them during the period November 27 to December 7, 1941.

(c) To effect liaison on a basis designed to acquaint each of them with the operations of the other, which was necessary to their joint security, and to exchange fully all significant intelligence.

(d) To maintain a more effective reconnaissance within the limits of their equipment.

(e) To effect a state of readiness throughout the Army and Navy establishments designed to meet all possible attacks.

(f) To employ the facilities, material, and personnel at their command, which were adequate at least to have greatly minimized the effects of the attack, in repelling the Japanese raiders.

(g) To appreciate the significance of intelligence and other information available to them.³⁶⁷

The JCC report stated specifically that the "errors made by the Hawaiian commands were errors of judgment, and not derelictions of duty."³⁶⁸ The press reported this finding prominently.³⁶⁹ The findings of the JCC stand as final, official "corrections" of the original finding of "dereliction of duty" in the Roberts Commission's report.

N. Executive Discretion: the Controlling Constitutional Principle

Kimmel and Short advocates have complained that the commanders were denied due process, that they were not allowed representation by counsel, to cross-examine witnesses, or to air their version of events pub-

367. JCC, *supra* note 156, at 252.

368. *Id.*

369. *E.g., Roosevelt Found Blameless, supra* note 291, at 12, col. 2.

licly,³⁷⁰ and that there is therefore error in the associated personnel actions taken against them and in the many investigations of the attack on Pearl Harbor. The government, however, has taken no action against Kimmel or Short that entitled either of them to due process. The actions taken by the government include: (1) Secretary Knox's initial investigation of the disaster at Pearl Harbor for the President; (2) the decision to relieve Admiral Kimmel and Lieutenant General Short of command; (3) the decision of the President to order a more thorough inquiry, presided over by a sitting Supreme Court Justice;³⁷¹ (4) the acceptance of Kimmel's and Short's offers to retire; (5) the conduct of additional investigations amidst the din of partisan accusations and global war; (6) the postponement of decision on courts-martial to protect vital cryptologic capabilities and keep America's admirals and generals engaged in combat; (7) the release of information to the public on actions being taken in the wake of the worst military disaster in American history; (8) the President's and Secretaries' discretionary decisions with respect to the appropriate action to take against Admiral Stark, General Marshall, General MacArthur and other subordinate officials; and (9) decisions not to advance Kimmel or Short on the retired list.³⁷² Whatever grievances Rear Admiral Kimmel and Major General Short might have had against these actions, they are not recognized or remediable at law.

Kimmel's advocates have focused on the findings of the Court of Inquiry, that Rear Admiral Kimmel was not derelict in the performance of his duties. Similarly, they have emphasized the failure to provide courts-martial (apparently unaware that Kimmel refused the offer of a court-martial), implying that courts-martial would have produced acquittals. Perhaps so, but the discretion of the President and senior officials in the military chain of command to weigh evidence and make determinations about the quality of Rear Admiral Kimmel's and Major General Short's judgment, and their suitability for three- and four-star rank, has never been coterminous with the question of guilt of a criminal offense. As stated by

370. *But see supra* note 161 and accompanying text.

371. The appointment of Justice Owen Roberts to head the Roberts Commission's initial investigation into the attack on Pearl Harbor was a significant step taken to ensure the integrity of the investigation. The integrity of the investigation might have been questioned if an Executive Branch official had been appointed to head the Commission. To insulate them from political influence, the Constitution provides that federal judges enjoy life tenure and their salaries may not be reduced while in office. U.S. CONST. art 3, § 1. Additionally, no credible investigation of the Pearl Harbor attack could have been conducted without the participation of the military commanders in charge on Oahu. PHA (pt. 7), *supra* note 42, at 3267.

Admiral Carlisle Trost in 1988 while serving as Chief of Naval Operations, "there is a vast difference between a degree of fault which does not warrant a punitive action and a level of performance which would warrant bestowal of a privilege."³⁷³

In the selection of two-star officers for advancement to three- and four-star grade, superior judgment and performance are touchstones. The President and his principal subordinate officials in the Executive Branch make such determinations on the basis of nonjusticiable constitutional discretion. There is no adjudicative forum in which a final judgment of "appointment" may be won, nor may Congress compel an appointment by legislative act.³⁷⁴ Three- or four-star rank is not a *personal attribute*; it is a public office. Advancement to such rank is not a "remedy;" it is the investiture of enhanced authority to facilitate the execution of increased

372. The Kimmels have also alleged that the Navy Department threatened "to take away construction contracts from Frederick R. Harris, Inc., a naval contractor, if they [sic] continued to employ Admiral Kimmel" after he had retired. Letter from Edward R. Kimmel to Undersecretary of Defense for Personnel and Readiness (Sept. 26, 1995) (enclosing a list of grievances dated 26 February 1995). The Kimmels have not produced a copy of correspondence or any other evidence to support this allegation. The complaint may allude to standards of conduct warnings. Rear Admiral Jacobs stated the official position of the Navy in Letter from Chief of Naval Personnel to Rear Admiral Kimmel (June 16, 1942), which approved Kimmel's employment "provided you will not be engaged in selling or contracting or negotiating for the sale of naval supplies and war material to the Navy or to the Navy Department." Rear Admiral Jacobs' letter to Rear Admiral Kimmel enclosed a legal memorandum that addressed the limitations on post-retirement employment with government contractors. Similar limitations, or "standards of conduct," are still in effect today. See *Standards of Conduct*, Digest of Laws, 32 C.F.R. § 721.15(c)(1)(ii) (1997). Otherwise, the Navy publicly defended Kimmel's right to receive retired pay and to accept post-retirement employment with Harris, Inc. See *Navy Justifies Pay Received by Kimmel; Department also Backs Right to Accept Civilian Post*, N.Y. TIMES, Aug. 11, 1942, at 4, col. 2. There has never been an issue of wrongful denial of compensation in the cases of the Pearl Harbor commanders. The Act under which Rear Admiral Kimmel had been advanced temporarily to the grade of Admiral (Act of May 22, 1917, ch. 20, § 18, 40 Stat. 84, 89) provided specifically that officers who returned to their regular ranks after being detached from temporary promotion billets would receive only the pay and allowances of their regular rank. Pursuant to an Act of May 20, 1958, 72 Stat. 122, 130, Rear Admiral Kimmel's retired pay was recomputed in accordance with a complex statutory formula, and he received thereafter retired pay comparable to that of a retired three-star admiral. Congress did not base eligibility for recomputation of retired pay under the 1958 Act on discretionary selection of individuals; no one attempted to deny Rear Admiral Kimmel this benefit to which he was entitled by law. See *Dorn Staff Study*, *supra* note 39, at I-1. A fire at the National Personnel Records Center destroyed Major General Short's pay records in 1973. Neither Major General Short nor any of his survivors has ever claimed that the government denied Short due compensation before his death in 1949.

373. *Supra* note 211.

responsibilities. The conclusion has been reached numerous times that Admiral Kimmel and Lieutenant General Short's execution of such increased responsibilities did not rise to the level expected of officers serving in three- or four-star rank. As stated by Secretary Forrestal, Kimmel "failed to demonstrate the superior judgment necessary for exercising command commensurate with [his] rank and . . . assigned duties."³⁷⁵ In declining to recommend Major General Short for advancement on the retired list, Secretary of the Army Stone stated in 1992 that he was "unable to make th[e] determination" "that General Short had served satisfactorily in the grade of lieutenant general."³⁷⁶ The freedom to make such judgments inheres in executive office.

Failure to advance Kimmel and Short does not signify that they were solely responsible for Pearl Harbor, nor does it reattach to them the badge of "dereliction," long since officially removed through the findings of various investigations and endorsements. The fact that executive discretion supported the advancement of other officers on the retired list, or that Roosevelt decided to allow other officers to continue serving (who thereafter distinguished themselves during the War), is not legally relevant to any decision made with respect to Rear Admiral Kimmel and Major General Short.³⁷⁷ They must be judged on their own merits.³⁷⁸ There is no system or methodology to compare and "regularize" the ranks of admirals and generals by *officially* "correcting," up or down, the allegedly undeserved positive or negative impacts of constitutionally sound decisions upon individual reputations. No officer has a right to the equal affection and confidence of the President. The President may prefer different officers over others, for purely subjective reasons.

Advocates for Kimmel and Short have characterized the government's actions with respect to the commanders as a series of outrages against law—star chamber proceedings, denial of counsel, secret evidence, impoundment of records, suppression of witnesses. All of these emotional arguments are based on claims to rights that did not exist. No legal error can be discerned in the various personnel actions taken in the Pearl Harbor cases. Counsel for the Kimmels has not cited one case or statute that indi-

374. See, e.g., 41 Op. Att'y Gen. 291, 292 (1956) ("Congress may not, in connection with military appointments or promotions to higher offices, control the President's discretion to the extent of compelling him to commission or promote a designated individual.").

375. PHA (pt. 16), *supra* note 42, at 2429.

376. Letter from Secretary of the Army to Senator Pete V. Domenici (Sept. 2, 1992).

cates otherwise. The controlling legal principle in these cases is constitutional executive discretion.³⁷⁹

Under the authority conferred upon him by the Constitution, the President may revisit today, tomorrow, or at any time, the judgments made about Kimmel and Short. He may make or decline to make posthumous appointments, notwithstanding the precedents set by his predecessors. Both sides of this debate may appeal to the President's discretion. Some

377. As long as actions taken in an individual case are within the limits defined by law, comparison to other cases does not give rise to any issue on appeal—with one exception. The only possible claim of “selective prosecution” that might be recognized by law is rooted in the principle of equal protection implicit in the Due Process Clause of the Fifth Amendment. *Schlesinger v. Ballard*, 419 U.S. 498, 500 (1975) (Although the Fourteenth Amendment’s Equal Protection Clause applies only to the states, the Fifth Amendment Due Process Clause contains an equal protection element); *Woodard v. Marsh*, 658 F.2d 989 (5th Cir. 1981) (citing *Rostker v. Goldberg*, 453 U.S. 57 (1981) (The due process clause of the Fifth Amendment has generally been held to make Fourteenth Amendment equal protection law applicable to the federal government.)). In the context of “selective prosecution,” the equal protection principle does not guarantee equal results for all. A successful “selective prosecution” claim must demonstrate that the claimant was “similarly situated” with respect to others who received more favorable treatment, and that discrimination against him was based on a constitutionally impermissible ground. The lead case, *Wayte v. United States*, 470 U.S. 598 (1984), spells out these principles. The Kimmel and Short cases cannot meet the standards prescribed for “selective prosecution” claims, because the principle applies only in criminal cases. Kimmel and Short were not “similarly situated” with respect to other officials in Washington or elsewhere (the various senior officers to whom fault has been attributed had profoundly different duties, different experience, and different skills, as assessed by the President), and there has been no discrimination against Rear Admiral Kimmel or Major General Short on a “constitutionally impermissible basis” (narrowly confined by equal protection precedent to such bases as race, religion, ethnicity, or retaliation for the exercise of individual constitutional rights, such as freedom of speech). See *United States v. Hagen*, 25 M.J. 78, 83 (C.M.A. 1987); *United States v. Means*, 10 M.J. 162, 165-66 (C.M.A. 1981). In the absence of discrimination on a constitutionally impermissible basis, the law is well-settled that there is no claim to “comparative justice.”

The President's paramount constitutional power as Commander in Chief to retain particular subordinate military officers of his selection in key command positions establishes per se that officers not so selected are not “similarly situated.” The President, as Commander in Chief, was entitled constitutionally to continue employing Marshall, Stark, MacArthur and Turner in the military capacity he deemed appropriate, without reference to whatever jealousies their assignments might generate. *E.g.*, *BASS*, *supra* note 8, at 167 (“[T]he power to assign military officers to posts . . . gives presidents the opportunity to shape the leadership of the military.”); *ROSSITER*, *supra* note 58, at 2 (“The . . . appointment and removal of ‘high brass’ . . . are matters over which no court would or could exercise the slightest measure of judgment or restraint.”); *KOENIG*, *supra* note 56, at 242-43 (“As Commander-in-Chief the President appoints and removes his field generals.”); *SMITH*, *supra* note 8, at 48 (“[T]he President . . . may at his discretion remove any officer from a position of command.”).

authors continue to point out grave errors in Kimmel's or Short's judgment,³⁸⁰ while others continue to capitalize on the scapegoat brief first formulated by Republicans seeking to discredit the Roosevelt Administration.³⁸¹ The archive of material consulted to prepare this article

378. Kimmel's counsel has criticized "the scapegoat approach to assessing responsibility for a national calamity by the process of hastily fixing sole responsibility on the Army or Navy commander at the scene of its impact." Hanify Memo, *supra* note 71, at 2. The Pearl Harbor section of this article has not explored the principle of strict accountability of officers in command, because no official ever held Rear Admiral Kimmel or Major General Short accountable under the theory of "strict liability" traditionally applicable to officers in command. See U.S. Navy Regulations, art. 0802 (1990) ("The responsibility of the commanding officer for his or her command is absolute While the commanding officer may . . . delegate authority to subordinates . . . such delegation of authority shall in no way relieve the commanding officer of continued responsibility for . . . the entire command."). Cf. U.S. Navy Regulations, art. 182(6) (1920). The "doctrine" of accountability does not depend on personal fault. The actions taken with respect to Kimmel and Short, however, did not depend on the principle of strict accountability, but on discretionary assessments of the commanders' actual conduct, failure to act, or ability to command effectively.

In legal proceedings, the responsibility of an on-scene commander is measured by what he did with what he had, in terms of both knowledge and resources, not by what he might have done had he been given more by higher authority. The latter standard would lead in every case to a finding of no responsibility for local commanders based on their hypothetical ex post facto assertions of what they would have done "if only" Thus Secretary Stimson assessed the conduct of General Short as follows: "I find that he failed in the light of information which he had received adequately to alert his command to the degree of preparedness which the situation demanded . . ."; PHA (pt. 35), *supra* note 42, at 15 (emphasis added). The Secretary did not fault General Short for failing to avert the attack; instead, he faulted him for what he did and did not do with what he had. The Roberts Commission premised its finding of dereliction of duty on this standard. *Id.* (pt. 7) at 3285 ("In light of the warnings and directions to take appropriate action, transmitted to both commanders between November 27 and December 7 . . ."). Similarly, Secretary Forrestal in his endorsement of the Navy Court of Inquiry concurred with Admiral King that "the pertinent question is whether Admiral Kimmel used the means available to the best advantage," notwithstanding unavoidable shortages in personnel and material, and that "the information available to Admiral Kimmel called for a tightening up of the defense precautions." *Id.* (pt. 16) at 2403, 2405 (emphasis added). The JCC report based its findings of fault on "information possessed by them" [the Hawaiian commands], finding that the commanders failed "to employ the facilities, matériel, and personnel at their command, which were adequate at least to have greatly minimized the effects of the attack . . ." JCC, *supra* note 156, at 252 (emphasis added). In his recent review of government actions taken with respect to Admiral Kimmel and General Short, Dr. Edwin Dorn, Under Secretary of Defense (Personnel and Readiness) applied the same situationally sensitive standard: "The intelligence available to Admiral Kimmel and General Short was sufficient to justify a higher level of vigilance than they chose to maintain." *Dorn Report*, *supra* note 39, at 4 (emphasis added). See also *Dorn Staff Study*, *supra* note 39, at III-15. Cf. David Kaiser, *Conspiracy or Cock-up? Pearl Harbor Revisited*, 9 INTEL AND NAT'L SECURITY 354, 368 (1994); WILLIAM F. HALSEY, ADMIRAL HALSEY'S STORY 75-76 (1947).

evidences many thousands of hours of work by government officials to

379. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 165-167 (1803) (opinion by Chief Justice Marshall):

By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders. In such cases, their acts are his acts; and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists, and can exist, no power to control that discretion. The subjects are political. They respect the nation, not individual rights, and being entrusted to the executive, the decision of the executive is conclusive . . . [W]here the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable . . . The powers of nominating to the senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion.

See also 11 DEBATES IN THE HOUSE OF REPRESENTATIVES, FIRST SESSION: JUNE-SEPTEMBER 1789, at 921-27 (Charles Bangs Bickford et al., eds. 1992) (Madison: The checks on the President for "wanton removal of meritorious officers" are impeachment and public opinion); ROSSITER, *supra* note 58, at 2 (1976) (The President's "powers in the broad field of national defense are largely discretionary. . . . For his conduct of such affairs the President is responsible, so far as he can be held responsible, only to Congress, the electorate, and the pages of history.").

380. See, e.g., HARRY A. GAILEY, *THE WAR IN THE PACIFIC* 83-84 (1995):

Washington authorities believed that sufficient warning had been given to both Kimmel and Short The admiral saw no reason to change the orders that he had issued in October regarding security aboard ships. He further decided against increasing security and readiness measures on the vessels within Pearl Harbor. Nor did Kimmel order any long-range aerial scouting missions However one wishes to sympathize with Kimmel, it is difficult to comprehend why a seasoned flag officer who had been told that a dispatch was a "war warning" failed to take such basic precautions. One possible explanation is that, confident in his preparations, he ignored the fact that during fleet exercises in 1928 and again in 1932 and 1938, successful air attacks had been launched against Hawaii by American planes acting as aggressors Vice Admiral William F. Halsey Jr., aboard the *Enterprise*, believed hostilities were imminent and put the carrier on war alert. Because of the movement of these carriers [i.e., *Lexington* and *Enterprise* to Midway and Wake], the southwest approaches to Hawaii were reasonably well covered by planes from the two task forces. However, nothing was done to cover the northwest approaches—which in previous naval air exercises had been considered the most important sectors.

respond to decades of reiteration of the same complaints made with respect to Kimmel and Short. The Kimmels have vowed to continue this struggle.³⁸² Although there is no formal principle of *res judicata* in discretionary executive decisions, at some point in history the Executive Branch must have a practical, efficiency-based interest in the finality of administrative decisions which are nonjusticiable, decisions from which there would be no recourse for ordinary people whose rights are subject to the many preclusive legal principles discussed in this article. The Kimmels, with the Shorts in tow, seek, through cross-branch political manipulation, exception from established principles of law.

The campaign to reverse lawful decisions of a previous President and his deputies challenges fundamental principles of executive authority. The disregard for such authority, evident in the frequently petulant demands of the Kimmels,³⁸³ sheds light on the unfavorable reception their campaign continues to receive within the executive branch. The consequences of officially "correcting" discretionary decisions made by past constitutional authorities would be a creeping encroachment on the exercise of discretion in future cases, by recognizing standards and limits in the exercise of discretion where no standards or limits exist and none were intended to exist. It is one thing for the President to change his mind and show leniency in a case in which he has already acted, and entirely another to attempt to compel a future President to reverse his predecessor on the basis of subjective values argued as superior to the President's constitutional power.

There is no "cover-up." The *Dorn Report* candidly admitted broadly shared fault for the Pearl Harbor disaster. Denial of posthumous promo-

381. E.g., EDWARD L. BEACH, *SCAPEGUATS* (1995):

The emotional change in national outlook, combined with the shock to our pride, brought about, as Roosevelt understood it might, an almost pathological search for someone to blame for allowing it to happen. He needed scapegoats, if for no other reason than to allow him to carry on the war. Upon Adm. Husband E. Kimmel . . . and Lt. Gen. Walter C. Short . . . therefore landed the weight of national obloquy . . .

382. E.g., Bradley Peniston, *Defending His Life, Son Continues Fight to Clear Father's Name in Pearl Harbor Disaster*, THE CAPITAL, Jan. 4, 1996, at B1 (Retired Navy Captain Thomas Kimmel, one of Rear Admiral Kimmel's sons, reacted with disappointment to the *Dorn Report*. Captain Kimmel blamed the rejection of posthumous advancement for Rear Admiral Kimmel on politics—"[T]he Democrats were worried about tarnishing Roosevelt"—and indicated that the Kimmels would wait for another Republican administration to renew their intergenerational efforts into yet the next generation of Kimmels.); *Thurmond Hearing*, *supra* note 38, at 72-73 (Manning Kimmel IV).

383. E.g., *Thurmond Hearing*, *supra* note 38, at 15-16, 66 (Manning Kimmel IV).

tion for Kimmel and Short can no longer be called "a large concrete sarcophagus which is inscribed with a large rump on the backside saying this butt [President Roosevelt's] must be protected."³⁸⁴ Even admitting for the sake of argument all of the facts alleged by the Kimmels and Shorts and their more rational advocates, nothing done in the Kimmel and Short cases exceeded the President's power. The more important consideration in these cases is not protection of Roosevelt's reputation, but, unapologetically, protection of the established scope of Presidential power itself.

As executive officials have stated repeatedly with respect to these cases, the facts do not warrant posthumous promotion, nor, let it be added, does the law require it.

III. Case Study: U.S.S. *Indianapolis*

Three recent Congressional inquiries concerning Captain Charles B. McVay III have renewed interest in his famous court-martial.

In a letter of 18 September 1995 to Vice Admiral Philip M. Quast (then Commander, Military Sealift Command), Representative Andrew Jacobs, Jr., of Indiana requested that Admiral Quast lend his efforts to the exoneration of Captain McVay.³⁸⁵ On 17 October 1995, Admiral Quast forwarded Congressman Jacobs' letter to the General Counsel of the Navy for response to Congressman Jacobs.

In a letter to the Secretary of Defense, dated 7 February 1996, Representative Timothy Holden of Pennsylvania requested reconsideration of the McVay case, enclosing a copy of a recent letter to the President from constituent Leon Bertolet. The White House forwarded Congressman Holden's request to the Secretary of the Navy for direct response.

On 13 March 1996, Representative Floyd Spence, Chairman of the House Committee on National Security, wrote to Rear Admiral Robert Natter, Chief of Legislative Affairs, Department of the Navy, requesting

384. *Id.* at 44 (John Costello).

385. Congressman Jacobs' letter followed a public speech given by Admiral Quast at the dedication of a national memorial to U.S.S. *Indianapolis* in the City of Indianapolis on 2 August 1995, the fiftieth anniversary of the rescue of the surviving crewmen.

an investigation of the McVay case and a full report. Chairman Spence's letter also enclosed a copy of Leon Bertolet's letter to the President.

The circumstances surrounding the sinking of *Indianapolis*, the four-day delay in rescuing the surviving crew members from the water, and the court-martial of Captain McVay have been the subject of numerous previous inquiries, several books, many journalistic articles, a television movie, and a legal study completed at the request of Senator Richard Lugar in 1992.³⁸⁶ The centerpiece of controversy over the fate of *Indianapolis* has become the court-martial of Captain McVay. Critics have impugned the court-martial on numerous legally imprecise grounds, stimulating widespread popular misconception. Proponents of a theory that Captain McVay was made a "scapegoat" for institutional failures of the Navy and the shortcomings of higher ranking officers have urged that his court-martial be expunged and Captain McVay be exonerated of fault for the tragedy. Accordingly, this section reviews the facts surrounding Captain McVay's trial, and analyzes in detail the charge under which he was convicted. Even taking the basic facts as the critics generally allege, the conclusion compelled by applicable law is that Captain McVay's court-martial is sound and remedial action is not warranted.³⁸⁷

A. The Sinking of *Indianapolis* and the Court-Martial of Captain McVay³⁸⁸

On 18 November 1944, Captain Charles B. McVay III assumed command of *Indianapolis*. A kamikaze attack damaged *Indianapolis* at Okinawa in April 1945 while serving as Admiral Spruance's Fifth Fleet flagship. Mare Island Naval Shipyard overhauled her between early May and mid-July 1945, then she put to sea on 16 July 1945, to deliver atomic bomb components to Tinian. Upon completion of this mission on 26 July, the Commander in Chief of the Pacific Fleet (CinCPac) ordered *Indianapolis* to proceed to Guam (CinCPac's forward headquarters) for further routing to Leyte, Philippines. Upon arrival at Leyte, CinCPac's orders stated that *Indianapolis* should report by dispatch to Commander, Task Force 95 (then at Okinawa) for duty, but that Commander, Task Group 95.7 should arrange ten days of training for *Indianapolis* in the Leyte area. The CinCPac orders did not specify departure and arrival dates. Com-

386. Letter, J. Lee McNeely of McNeely, Sanders, Stephenson & Thopy, of Shelbyville, Indiana, to Senator Richard Lugar, subject: Review of the Proceedings Surrounding the Court-Martial of Captain Charles B. McVay III (Nov. 20, 1992) [hereinafter *Lugar Study*].

mander, Task Force (CTF) 95 and Commander, Task Group (CTG) 95.7 were information addressees of these orders, but CTG 95.7's copy was garbled in reception or decoding and his communications staff did not request a retransmission. Accordingly, CTG 95.7 was not aware that *Indianapolis* had been directed to report to him for refresher training.

After *Indianapolis* arrived at Guam on 27 July, the CinCPac Assistant Chief of Staff for Operations, Commodore Carter, referred Captain McVay to the Port Director for routing instructions and an intelligence briefing. In the Port Director's office, Captain McVay and the routing officer assigned to work with him settled on a 15.7 knot speed of advance³⁸⁹ along the standard transit route between Guam and Leyte.³⁹⁰ The routing instructions specified departure from Guam at 0900 on Saturday, 28 July, with expected arrival at 1100 on Tuesday, 31 July, a three-day transit. Captain McVay inquired about the availability of an escort and

387. In addition to legal sources cited herein, the following sources of information were reviewed in the preparation of this study: the complete official service record of Captain McVay and all accompanying official personnel files maintained by the National Archives and Records Administration; the original Record of Trial of Captain McVay's general court-martial, and all post-trial review records; the official record of the court of inquiry commenced on 13 August 1945 to inquire into the demise of *Indianapolis*, at the direction of Admiral Nimitz, and all endorsements and subsequent correspondence included with the record, including the two supplemental reports of the Naval Inspector General; Navy Department correspondence concerning the disposition of Captain McVay's case; the report of a legal review commissioned by Senator Lugar; recent press treatment of the sinking of *Indianapolis* and Captain McVay's court-martial; and four books dedicated to the *Indianapolis* tragedy and Captain McVay. See DAN KURZMAN, *FATAL VOYAGE* (1990); RAYMOND B. LECH, *ALL THE DROWNED SAILORS* (1982); RICHARD F. NEWCOMB, *ABANDON SHIP!* (1976); THOMAS HELM, *ORDEAL BY SEA* (1963). Samuel Eliot Morison's account of the loss of *Indianapolis* was also consulted. SAMUEL ELIOT MORISON, *14 HISTORY OF UNITED STATES NAVAL OPERATIONS IN WORLD WAR II, VICTORY IN THE PACIFIC* 319-30 (1960). John Harriss's *SCAPEGOAT! FAMOUS COURTS MARTIAL* (1988) has an unnumbered chapter on Captain McVay, beginning on page 224. Harriss's account is based entirely on Lech and Newcombe and is narrowly focused on the "scapegoat" thesis without in-depth analysis. Harris presents a collection of the clichés of the conspiracy theorists: he discounts the information on submarine contacts that was available to *Indianapolis*; he assumes that discretion to zigzag in the sailing instructions freed McVay of responsibility for prudent decisions on evasive maneuvering; he attributes too much significance to ULTRA information (supposing, incorrectly, like other authors, that ULTRA showed exactly where the Japanese submarines were located); and he also sensationalizes the fact that a Japanese commander testified at Captain McVay's court-martial. This article addresses each of these issues.

388. Official accounts of the events surrounding the sinking of *Indianapolis* are readily available to the public in two Naval Inspector General's reports of 7 January 1946 (to CNO), reprinted in LECH, *supra* note 387, at 231-53 (1982). There is no substitute, however, for careful reading of the sworn testimony in the record of the Court of Inquiry and the Record of Trial.

the routing officer informed him that none was required.³⁹¹ *Indianapolis* had traveled unescorted before,³⁹² and Captain McVay gave no further consideration to the issue of an escort. A standard clause in the routing instructions left zigzagging to the discretion of the commanding officer.³⁹³

After *Indianapolis* departed Guam on 28 July, the Port Director transmitted her departure time, speed, route, estimated time of arrival at Leyte, and expected mid-transit "chop"³⁹⁴ date from Commander, Marianas

389. Captain McVay chose this speed when offered a two-day transit at 24-25 knots, or a three-day transit at approximately 16 knots. *United States v. McVay*, Record of Trial, at 350 (Dec. 3, 1945) (on file with The Judge Advocate General of The Navy at JAG Code 20) (testimony of Captain McVay). A fuel conservation limit on transit speeds in effect in the Pacific theater apparently did not affect the choice of transit speeds. The speed chosen accommodated Captain McVay's desire to arrive off the entrance to Leyte Gulf at daylight in order to conduct anti-aircraft practice prior to entering the Gulf. A higher speed would have made submarine targeting of *Indianapolis* more difficult.

390. The Wartime Pacific Routing Instructions in effect at the time specified standardized routes between combat operations areas. Accordingly, the Port Director's office assigned *Indianapolis* route "Peddie," the standard route between Guam and Leyte. Changes in the standard routes had been recommended, but the Navy Department had not acted on the recommendation before *Indianapolis* sailed.

391. The issue of an escort has been the subject of considerable controversy. As an older cruiser (launched in 1931), *Indianapolis* was not outfitted with submarine detection equipment. In his endorsement of the Court of Inquiry's report, Fleet Admiral King (Chief of Naval Operations) recommended that the Secretary of the Navy (Forrestal) direct additional investigation into the reasons for routing *Indianapolis* without an escort. Further consideration of the question revealed that a requirement for escort by anti-submarine capable ships was in place in an area well to the north of Guam. Allied forces had pushed the sphere of Japanese control back across the Pacific to the immediate vicinity of Japan; the area along the route from Guam to Leyte was considered a rear area at this point in the war. Requirements closer to Japan had stretched escort assets thin. Although escorts were not required for warships transiting route "Peddie," one could have been provided if available. However, Captain McVay and the routing officer did not discuss the availability of an escort further after the Operations Office for Commander, Marianas (COMMARIANAS) affirmed the policy that an escort was not required. LECH, *supra* note 387, at 19-20, 234-35; NEWCOMB, *supra* note 387, at 49-50.

392. For example, *Indianapolis* had transited unescorted from San Francisco to Tinian (near Guam) while transporting critical atomic bomb components. See LECH, *supra* note 387, at 20; *McVay Record* at 350 (testimony of Captain McVay) ("I didn't give it another thought, because I had traveled many times without an escort."). Proponents of Captain McVay, however, have perpetuated the false assertion that "McVay was . . . ordered to sail unescorted, the first time during the war that a large ship did so." See, e.g., Burl Burlingame, *Historian: McVay Didn't Have Spy Data*, HONOLULU STAR BULL., Nov. 4, 1993, at A6.

393. "Commanding Officers are at all times responsible for the safe navigation of their ships . . . Zigzag at discretion of the Commanding Officer." LECH, *supra* note 387, at 211. The routing instructions are at *McVay Record*, Exhibit 1.

(COMMARIANAS), to Commander, Philippine Sea Frontier (30 July).³⁹⁵ CTF 95, who had received CinCPac's tasking orders for *Indianapolis*, did not receive from the communications center on Okinawa the Guam Port Director's departure message with specific dates and times. CTG 95.7 did receive the Port Director's departure message, but its significance to him was not clear because he was unaware of the previous (garbled) CinCPac orders that had tasked him to provide ten days of training for *Indianapolis*.³⁹⁶ Because of these communications lapses, neither commander possessed sufficient information to cause him to monitor the arrival of *Indianapolis* at Leyte on 31 July. COMMARIANAS, Commander, Philippine Sea Frontier, and the Port Director at Leyte received the Guam Port Director's message.

All sources agree that no one provided Captain McVay information on enemy submarine activity derived from codebreaking of Japanese communications under the "ULTRA" signals intelligence (SIGINT) program.³⁹⁷ ULTRA information concerning the activities of Japanese submarines in the Western Pacific in July was available to key officials on the staffs of CNO (then also serving as Commander in Chief, U.S. Fleet), CinCPac, and COMMARIANAS.³⁹⁸ The apparent policy at CinCPac was that pertinent ULTRA information should be provided with routing instructions in a generalized and sanitized form so that its source could not be identified.³⁹⁹ The Port Director at Guam relied on the Surface Operations Officer on the COMMARIANAS staff to provide intelligence for inclusion with ship routing instructions.⁴⁰⁰ Captain Oliver Naquin, the Surface Operations Officer, did not provide the Port Director the ULTRA information on submarine threats he held in July.⁴⁰¹ The 16 July ULTRA

394. "Chop" signifies "Change of Operational Control" from one regional commander to another.

395. Commander, Marianas (COMMARIANAS) and Commander, Philippine Sea Frontier, were regional sea commanders, responsible for naval activities in their geographic areas. The Commander in Chief, Pacific (CinCPac) Port Director transmitted the routing message for action to the Shipping Control Officer, Marianas Area; the Port Director at Tacloban, Leyte, Philippines; and CTG 95.7. Information addressees included Commander, Fifth Fleet (COMFIFTHFLT); COMMARIANAS; CTF 95; Commander, Philippine Sea Frontier; and CinCPac. See LECH, *supra* note 387, at 53, 215; USS Indianapolis Court of Inquiry, exhibits 2, 19 (Aug. 13, 1945).

396. LECH, *supra* note 387, at 26-27, 240-41 (Naval Inspector General's report to Chief of Naval Operations).

397. Signals intelligence information within the ULTRA program was highly classified and tightly controlled. The Japanese would have changed their code had they suspected that the Allies had broken it, depriving the United States of a bounty of information critical to prosecution of the war.

report for the Pacific theater included the Japanese submarine that attacked *Indianapolis* days later, I-58.⁴⁰²

The intelligence briefing for *Indianapolis*'s transit provided by the Port Director at Guam also omitted the sinking of a destroyer escort, U.S.S. *Underhill*, by a sub-launched suicide torpedo (a "*kaiten*"⁴⁰³) on 24 July near Okinawa.⁴⁰⁴ Why the sinking of *Underhill* was omitted is not clear.⁴⁰⁵ The 16 July ULTRA report for the Pacific indicated that I-53, the submarine that sank *Underhill*, had departed the Empire on 14 July for patrol in the Okinawa area, far to the North of *Indianapolis*'s track.⁴⁰⁶

The intelligence enclosure provided with *Indianapolis*'s routing instructions did contain three reports of "enemy submarine contacts:" on 22 July a submarine had been sighted surfaced seventy-two miles south of *Indianapolis*'s projected track and a hunter-killer group had been ordered to respond; on 25 July a "possible periscope" had been sighted ninety-five miles north of the projected track; and again on 25 July a sound contact characterized as a "doubtful submarine" had been detected 105 miles south of *Indianapolis*'s track.⁴⁰⁷ The government presented testimony at Captain McVay's trial that these three contact reports placed possible enemy submarines within striking distance of *Indianapolis*, given the course and

398. LECH, *supra* note 387, at 13-16, 23-24, 233 (Naval IG's report); KURZMAN, *supra* note 387, at 44-47. See also Richard A. von Doenhoff, ULTRA and the Sinking of USS *Indianapolis*, Remarks before the 11th Naval History Symposium (Oct. 1993) (Among sources consulted, von Doenhoff stands alone in doubting that COMMARIANAS would have been provided copies of ULTRA intelligence reports.). Exactly how much information was available in ULTRA channels on the four Japanese submarines has never been conclusively established, but this has not deterred proponents of McVay from suggesting that dissemination of ULTRA information would have changed the course of history. Declassified reports that have been identified include a Joint Intelligence Committee, Pacific Ocean Area (JICPOA) Report A-1 dated 16 July 1945, which indicated that submarines I-58 (the submarine that sank *Indianapolis*) and I-367 were scheduled to depart the Empire on 19 July for patrol in the Marianas-Carolinas area, a vast ocean area generally east of *Indianapolis*'s track to Leyte. A Seventh Fleet Intelligence Center weekly report of 21 July warned that I-58 and I-367 were patrolling in the central Pacific area, and daily CinCPac bulletins warned of I-367 (with no mention of I-58) on three occasions prior to 27 July. See von Doenhoff, *supra*, at 8-9, nn.7, 8, and enclosure (1) (citing NSA records held by the National Archives and Records Administration).

399. LECH, *supra* note 387, at 23.

400. *Id.* at 24. The Surface Operations Officer at COMMARIANAS received ULTRA information from a pipeline through CinCPac. KURZMAN, *supra* note 387, at 44-45.

401. The Naval Inspector General's reports to CNO attributed to Captain Naquin responsibility for the fact that *Indianapolis* did not receive ULTRA-derived information. See LECH, *supra* note 387, at 233, 247 (texts of the two IG reports of 7 January 1946).

speed specified in the routing instructions.⁴⁰⁸ *Indianapolis* received additional information on submarine threats along her track after she departed

402. A great deal of finger-pointing has been indulged over the failure to provide ULTRA information to Captain McVay. For example, writers have pointed out that Commodore Carter, the CinCPac Assistant Chief of Staff for Operations, failed to provide ULTRA information to Captain McVay when he directed him to the Port Director's office for routing instructions and an intelligence briefing (duties normally handled by routing officers in the Port Director's office). *E.g.*, LECH, *supra* note 387, at 15-16; KURZMAN, *supra* note 387, at 44-45. Kimo McVay, one of Captain McVay's sons, protested that, [b]efore taking over the *Indianapolis*, dad was the chairman of the joint intelligence committee of the combined chiefs of staff in Washington, the Allies' highest intelligence unit. And he was entrusted with the secrets of the atomic bomb. But they didn't want to give him a heads-up that Japanese submarines were in his path.

Burlingame, *supra* note 392, at A6 (quoting Kimo McVay).

While assigned to such duties from 1943 to 1944, Captain McVay would have had access to a great deal of highly classified information, but access to such information was and still is a consequence of the particular billet in which an officer is serving at the time. Failure to receive classified information is not justiciable. No one has an enforceable right to a security clearance or particular classified information. *See* Department of the Navy v. Egan, 484 U.S. 518, 528-29 (1988):

It should be obvious that no one has a 'right' to a security clearance For 'reasons . . . too obvious to call for enlarged discussion,' the protection of classified information must be committed to the broad discretion of the agency responsible, and this must include broad discretion to determine who may have access to it.

The legal significance of the ULTRA intelligence to Captain McVay's court-martial is discussed below. *See infra* notes 474, 481 and accompanying text.

403. *Kaiten* torpedoes were manned mini-submarine torpedoes equipped with a periscope and capable of independent piloting toward a selected target. Once launched, *kaitens* were unrecoverable. Up to six *kaitens* could be carried on the deck of an appropriately modified attack submarine.

404. LECH, *supra* note 387, at 12, 22-23; KURZMAN, *supra* note 387, at 43, 45-47; MORISON, *supra* note 387, at 317-19. *See generally* NEWCOMB, *supra* note 387, at 10. *Underhill* was broken in half when she attempted to ram a periscope, which turned out to be a *kaiten* and not a Japanese submarine.

405. Shortly after the *Underhill* sinking, Lech states that "Naval Intelligence at Pearl Harbor broadcast an emergency message to all commands in the Pacific" advising them not to ram suspected submarine contacts. Whether *Indianapolis* received this message with more detailed information about the sinking of *Underhill* is not known. LECH, *supra* note 387, at 13.

406. *Underhill* sank at 19-20.5N, 126-42E, and *Indianapolis* at 12-02N, 134-48E, a distance of over 730 miles. *See* MORISON, *supra* note 387, at 318, 324. The relevance of *Underhill*'s demise, therefore, is not entirely clear.

407. United States v. McVay, Record of Trial, at 20-21, exhibit 1(2) (Dec. 3, 1945) (on file with The Judge Advocate General of The Navy at JAG Code 20); NEWCOMB, *supra* note 387, at 50-51. Captain McVay's testimony at trial indicated that these three submarine contacts were already known aboard *Indianapolis* from radio traffic. *McVay* Record at 350.

Guam on 28 July. On Saturday, 28 July, a merchant vessel hauling Army cargo to Manila, the *Wild Hunter*, reported sighting a periscope seventy-five miles south of the position *Indianapolis* would pass on its track on Monday, 30 July. In a second message, *Wild Hunter* reported sighting the periscope again and firing on it. A U.S. hunter-killer group was dispatched and reported contact approximately 200 miles south of *Indianapolis*'s position. *Indianapolis* received a series of messages from *Wild Hunter* and the U.S.S. *Albert T. Harris* (DE 447) hunter-killer group on 29 July,⁴⁰⁹ leading Commander Janney, *Indianapolis*'s Navigator, to comment that evening in the wardroom that *Indianapolis* would pass a Japanese submarine during the night.⁴¹⁰ Information on the *Harris* datum was available on the bridge, and the Officer of the Deck was aware of it.⁴¹¹ During the night of 29 July, the radio room on *Indianapolis* reportedly received another message that two torpedoes had missed a merchant ship about 300 miles to the south.⁴¹²

Indianapolis was a very "tender" ship, meaning that she was particularly susceptible to capsizing or sinking from flooding. Like many warships launched before the age of radar, so much equipment had been added topside that Admiral Spruance once determined her metacentric height to be less than one foot, remarking that if she ever took a clean torpedo hit she

408. *McVay* Record at 20-24 (LCDR Alan R. McFarland, USN, who had served in various destroyers and was Commanding Officer of U.S.S. *Beche* (DD 470) at Iwo Jima and Okinawa).

409. *Id.* exhibit 15; NEWCOMB, *supra* note 387, at 55-56, 58; LECH, *supra* note 387, at 34; KURZMAN, *supra* note 387, at 52-54.

410. *McVay* Record at 68, 73; NEWCOMB, *supra* note 387, at 56; KURZMAN, *supra* note 387, at 52-53. When he dropped the night orders off on the bridge later that evening, Commander Janney commented that *Indianapolis* would pass through the area where *Harris* was prosecuting a submarine contact the next morning. *McVay* Record at 48, 56; LECH, *supra* note 387, at 34; NEWCOMB, *supra* note 387, at 58. Janney had apparently also listened to radio communications between ships in the *Harris* hunter-killer group as they coordinated their operations. KURZMAN, *supra* note 387, at 57.

411. *McVay* Record at 34-35, 37 (testimony of LTJG McKissick), at 48, 56 (testimony of LCDR Redmayne); KURZMAN, *supra* note 387, at 53-54, 56-57 (McVay visited the bridge one last time before retiring and chose not to inspect the message file there that contained the *Wild Hunter* message traffic).

412. *McVay* Record at 96, 99 (testimony of RMI Moran) (a "high precedence message" received at 2100); KURZMAN, *supra* note 387, at 53.

would capsize and sink in short order.⁴¹³ Captain McVay testified to this effect at the Court of Inquiry held after the sinking of *Indianapolis*:

Q. Is the INDIANAPOLIS class of cruisers reported as being a soft ship?

A. . . . [T]hey are so tender there are strict orders not to add any weight that cannot be fully compensated for. I have heard high ranking officers state as their opinion that they feel certain this class of ship could hardly be expected to take more than one torpedo hit and remain afloat.⁴¹⁴

In addition to her inherent stability-based vulnerability, the crew operated *Indianapolis* when cruising in "material condition YOKE modified," meaning that all of the watertight doors on the second deck were left open to provide ventilation to improve habitability.⁴¹⁵ Leaving these watertight fittings open made the ship particularly susceptible to loss by flooding.⁴¹⁶ Captain McVay's night orders specified that *Indianapolis* was steaming in "YOKE modified" when he retired on 29 July.⁴¹⁷ Captain

413. MORISON, *supra* note 387, at 319; KURZMAN, *supra* note 387, at 15; HELM, *supra* note 387, at 10-11.

414. USS *Indianapolis* Court of Inquiry, at 7 (Aug. 13, 1945).

415. KURZMAN, *supra* note 387, at 59; McVay Record at 285, 352, 362; *Court of Inquiry* at 2. The three "material conditions," XRAY, YOKE and ZEBRA (or ZED), refer to increasing degrees of watertight integrity aboard surface vessels. ZEBRA is the most secure condition, when all watertight enclosures are secured for battle. YOKE is the normal cruising condition. "YOKE modified" was an informally recognized condition less secure than YOKE.

416. McVay Record at 283-86 (testimony by an officer formerly in charge of the stability section at the Bureau of Ships (BUSHIPS)) ("It was obvious . . . that the water was free to flow down the second deck into the engineering spaces, so that the ship, for all practical purposes, was wide open."), 362 (McVay). The function of BUSHIPS is now performed by Naval Sea Systems Command.

417. *Court of Inquiry* at 3; McVay Record at 362.

McVay was fully aware of the special vulnerability of his ship to torpedo attack.⁴¹⁸

On the evening of 29 July, at a time when visibility was poor, Captain McVay told the Officer of the Deck that he could secure zigzagging after twilight.⁴¹⁹ The ship ceased zigzagging at approximately 2000.⁴²⁰ Visibility improved later that night after moonrise,⁴²¹ characterized by Captain McVay as follows: "There was intermittent moonlight at which times the visibility was unlimited."⁴²² The record of Captain McVay's court-martial contains extensive testimony by various *Indianapolis* crew members of improved visibility around the time of I-58's attack at midnight.⁴²³ The

418. BUSHIPS was also aware of the use of condition "YOKE modified" on many older ships and tacitly approved it. The point is not that Captain McVay was responsible for placing his ship in a dangerous, unauthorized condition with respect to watertight integrity. The Navy has never faulted Captain McVay for cruising in "YOKE modified." The point is that Captain McVay knew that his ship was particularly vulnerable to flooding, a fact that should have counseled even greater circumspection with respect to the threat of torpedo attack. The Captain also knew that Portland-class cruisers, like *Indianapolis*, were not equipped with acoustic submarine detection equipment.

419. *McVay Record* at 31, 37-38, 186-87, 360, (McVay: "I told the officer-of-the-deck . . . that he could cease zigzagging at dark . . ."). See KURZMAN, *supra* note 387, at 55-56; HELM, *supra* note 387, at 25, 45. Captain McVay did not recall specific orders on zigzagging in the night orders prepared by Commander Janney, but the Quartermaster of the Watch, Allard, did. *McVay Record* at 186-87.

420. *McVay Record* at 139, 183, 186, 192, 359, 371, and Exhibit 6(1) (Captain McVay's report to the Secretary of the Navy (SECNAV) on the loss of *Indianapolis*, 12 August 1945: "We had ceased zigzagging at 2000.").

421. See KURZMAN, *supra* note 387, at 57-58; NEWCOMB, *supra* note 387, at 59.

422. *McVay Record*, exhibit 6(1). Captain McVay thus described the visibility in a report to SECNAV prepared shortly after his rescue. He amended other parts of the report numerous times before submitting it, but he did not amend his statement on the visibility. *Id.* at 357. As he stated at his court-martial (when the legal significance of visibility had become clear), "[a]t the time I made out that official report . . . the question of visibility did not appear to me to be one of importance." *Id.* at 356. The conditions under which Captain McVay made his official report do not impugn but lend veracity to his description of the visibility. NAVAL COURTS AND BOARDS 142-433, ¶ 189 (1937) (Res gestae have "an element of truthfulness" because they are spontaneous, and near enough in time to the principal transaction "to preclude the idea of deliberate design or afterthought in making them." Strict contemporaneity is not required; some admissible res gestae occur days later. Each instance depends on circumstances.). See BLACK'S LAW DICTIONARY 1173 (5th ed. 1979) (Res Gestae: "A spontaneous declaration made by a person immediately after an event and before the mind has an opportunity to conjure a falsehood."). Scholars of evidence have long recognized "spontaneity as the source of special trustworthiness." See, e.g., McCORMICK ON EVIDENCE § 288, at 836 (Edward W. Cleary et al., eds. 1984).

significance of the degree of visibility is apparent from the following standing Naval instructions in effect at the time:

I. War Instructions, Fleet Tactical Publication (FTP) 143(A):⁴²⁴

Paragraph 702: When cruising, the officer in tactical command normally orders his command to zigzag . . . whenever there is a probability of encountering enemy submarines.

Paragraph 703: Generally speaking, all vessels . . . zigzag in submarine waters.

Paragraph 704: During thick weather and at night, except on very clear nights or during bright moonlight, vessels normally cease zigzagging.

Paragraph 707: Single ships of any speed zigzag in dangerous submarine waters.

II. U.S. Fleet 10B:⁴²⁵

Paragraph 3410: Ships . . . shall zigzag during good visibility, including bright moonlight, in areas where enemy submarines may be encountered . . . Zigzagging should normally cease after evening twilight and commence prior to morning twilight, unless the phase of the moon requires that zigzagging be continued.

III. Wartime Pacific Routing Instructions:⁴²⁶

Paragraph 342: Unescorted ships of speeds of 10 knots or more shall zigzag day and night except in heavy weather or low visibility while in open waters . . .

423. See *McVay* Record at 370 (the Judge Advocate's closing argument, cataloging specific references in testimony to good visibility). The previous court of inquiry had also found that visibility had been good. *Court of Inquiry*, Opinion 2. See *LECH*, *supra* note 387, at 172.

424. See *McVay* Record, exhibit 3.

425. *Id.* exhibit 4 (acknowledged by Captain McVay at 359, 362).

426. *Id.* exhibit 5. See *Court of Inquiry*, at 10 (*Indianapolis* was sailing within the area to which this instruction applied).

Shortly before midnight, submarine I-58 surfaced and spotted *Indianapolis* against the horizon.⁴²⁷ I-58 dove and maneuvered into attack position, launching a fan of six torpedoes, at least two of which struck *Indianapolis* shortly after midnight. With the fire, smoke, flooding and loss of critical systems aboard the ship, the crew responded valiantly. The Captain attempted to ascertain the degree of damage before deciding whether to abandon ship. When it was clear that the ship could not be saved, the word to abandon ship had to be passed orally due to the loss of internal communications systems. *Indianapolis* did not transmit successfully a distress message, despite two reported attempts; a wave swept the Captain into the Ocean before he could verify this important detail.⁴²⁸ The Pacific Ocean swallowed *Indianapolis* in less than fifteen minutes after the first blast. Of the nearly 1200 men aboard, approximately 400 went down with the ship, and 800 managed to escape into the water. Over the next four days, adrift on the ocean, 480 of the survivors of the submarine attack were preyed upon by sharks or succumbed to their wounds or the elements. Only 320 survived to be rescued.⁴²⁹

Many factors contributed to delay in the rescue of the *Indianapolis* survivors. *Indianapolis* did not successfully transmit a distress message.⁴³⁰ No one took action on a Japanese kill report.⁴³¹ Personnel in the Port Director's office in Leyte did not expect the ship to arrive until 31 July, and did not report her non-arrival on 31 July, due in part to the heavy volume of ship traffic. CTF 95 and CTG 95.7 were missing message traffic that might have caused them to inquire into the failure of *Indianapolis* to report at Leyte on 31 July.⁴³² Vessel routing procedures in CINCPAC 10-CL-45 and COMSEVENTHFLT 2-CL-45 stated that "arrival reports shall not be made for combatant ships,"⁴³³ which the Port Director at Leyte construed as implying that non-arrivals of combatant ships should also not be reported.⁴³⁴ Personnel in the Port Director's office were responsible primarily for merchant vessels and were accustomed to irregularities in the schedules of combatant ships due to unannounced diversions ordered by the operational chain of command.⁴³⁵ No procedures existed for reporting overdue combatant vessels. Personnel of COMMARIANAS and Com-

427. *Indianapolis* did not detect I-58 by radar.

428. The Navy has never challenged Captain McVay's uncorroborated account that he did not go down with his ship because he was swept over the side by a wave, notwithstanding apparent conflicts in his testimony. See *McVay Record* at 351 ("... I abandoned ship."), 355 ("I was sucked off... the ship by a wave."); *Court of Inquiry*, at 5 ("... I was washed off by a wave...").

429. LECH, *supra* note 387, at 156.

mander, Philippine Sea Frontier, simply assumed that *Indianapolis* had crossed the "chop" line on 30 July and had arrived in Leyte and took no further action.⁴³⁶ COMMARIANAS could have but did not reroute *Indi-*

430. *Court of Inquiry*, Finding of Fact 13 (negative check of all stations that might have received a distress signal). In his report forwarding the record of the 13 August Court of Inquiry, Admiral Nimitz attributed blame to Captain McVay for *Indianapolis*'s failure to send a distress message immediately after the explosions. See also *Court of Inquiry*, Opinion 42(b). In his first endorsement, Admiral King found that "[m]easures had not been taken in advance to provide for the sending of a distress signal in an emergency." King added:

The failure of Commanding Officer of the *Indianapolis* to have anticipated an emergency which would require the sending of a distress message on extremely short notice and his failure to have a procedure for dispatching such a message established on board ship, undoubtedly contributed to the apparent fact that no message was sent. The responsibility for this deficiency must rest with Captain McVay. It is possible that mechanical failure might have precluded the sending of a distress message even if one had been immediately available in proper form, but the record indicates no such message was ready and that this emergency had not been anticipated.

Id.

In the Eighth Endorsement on the report of the Court of Inquiry, the Chief of the Bureau of Ships stated that evaluation of the evidence indicated that electrical power was available to the radio transmitters on *Indianapolis* for an appreciable time before she sank. The convening authorities never charged Captain McVay with an offense based on these findings.

431. Commander in Chief, Pacific, intercepted a report from I-58 that it had sunk a battleship, but the geographic grid system used by the Japanese to indicate location had not been deciphered. The Pacific command intercepted many Japanese reports bragging of spurious ship sinkings. Commander in Chief, Pacific, did not provide a copy of I-58's message to COMMARIANAS, the commander responsible for the sea area where *Indianapolis* was later discovered to have been sunk. No one gave further attention to I-58's report when a confirming SOS was not received. KURZMAN, *supra* note 387, at 94-95.

432. See LECH, *supra* note 387, at 249 (IG's report of 7 Jan. 1946).

433. Commander in Chief, Pacific, intended this provision to reduce message traffic and provide greater security for the movement of combat vessels. *Court of Inquiry*, Opinion 23.

434. Admiral King placed blame for the ambiguity in these instructions on Admiral Nimitz. Nimitz later accepted blame for this deficiency publicly. See also LECH, *supra* note 387, at 252 (IG's report).

435. Admiral King placed blame for complacency and lack of initiative on personnel in the Leyte Port Director's office. Admiral Nimitz issued a letter of reprimand and a letter of admonition to two junior officers responsible for ship arrivals at Leyte. The Secretary of the Navy later withdrew these letters. The Inspector General's (IG) report of 7 January 1946 identified the "faulty general practice of ordering combatant units to one destination and then diverting them to another without giving information of the change to all interested commands" as a contributing factor in the failure to report *Indianapolis*'s non-arrival. LECH, *supra* note 387, at 249 (text of IG's report).

anapolis after receiving the *Wild Hunter* series of reports. The rescue of *Indianapolis* survivors finally commenced on 2 August after an overflying aircraft spotted men in the water. Upon being rescued by U.S.S. *Ringness*, Captain McVay insisted that *Ringness*'s message report to CinCPac include the fact that *Indianapolis* was "not zigzagging," notwithstanding the thoughtful objections of the Commanding Officer of *Ringness*.⁴³⁷

On 9 August, Admiral Nimitz ordered a Court of Inquiry into the sinking of *Indianapolis* and delay in reporting her loss.⁴³⁸ The Court designated Captain McVay an "interested party"⁴³⁹ and two legal counsel of Captain McVay's choice represented him throughout the proceedings. The Court of Inquiry met from 13 through 20 August. In its final report, the Court placed blame on Captain McVay for failure to zigzag⁴⁴⁰ and to transmit a distress message,⁴⁴¹ recommending that charges against Captain McVay be referred to a general court-martial. Admiral Nimitz disagreed with this recommendation and issued a letter of reprimand to the skipper of his former flagship instead. Upon reviewing the record of the Court of Inquiry, the Chief of Naval Operations, Fleet Admiral King, disagreed with Admiral Nimitz and recommended the court-martial of Captain McVay.⁴⁴² King's endorsement pointed to evidence of deficiencies in Captain McVay's performance more than sufficient to establish reasonable grounds to believe that offenses had been committed under applicable military law.⁴⁴³ But King was not satisfied with the thoroughness of the Court of Inquiry on numerous other grounds.⁴⁴⁴ The Secretary directed the Naval Inspector General to conduct additional investigation. After consideration of delaying a court-martial until the Inspector General's supple-

436. The Secretary of the Navy issued letters of reprimand to Commodore Gillette and Captain Granum of the Philippine Sea Frontier, but later withdrew these letters. The procedures in place did not provide for arrival reports for combatant vessels, thus COMMARIANAS and Commander, Philippine Sea Frontier, routinely assumed that combatants had arrived at their destination on time absent contrary information.

437. See KURZMAN, *supra* note 387, at 181.

438. The President of the three-member court was Vice Admiral Lockwood, Commander, Submarine Forces, Pacific (COMSUBPAC). The other members were Vice Admiral Murray, COMMARIANAS, and Rear Admiral Francis Whiting.

439. *Court of Inquiry*, at 2. The rights of an "interested party" at a court of inquiry included: to be present, to examine witnesses, to introduce new matter, to be represented by counsel, to testify (or not to testify) at the party's option. NAVAL COURTS AND BOARDS 357, ¶ 734 (1937). The record of the Court of Inquiry reflects that Captain McVay was allowed to exercise freely all of these rights.

440. *Court of Inquiry*, Opinions 3 ("That in view of all the attendant circumstances including Fleet doctrine, sound operational practice required *Indianapolis* to zigzag on the night in question.") and 42(a).

441. *Id.* Opinions 40, 42(b).

mentary investigation could be completed, Admiral King recommended that Secretary Forrestal refer charges to a court-martial immediately. The Judge Advocate General proposed charging Captain McVay with negligently suffering a vessel to be hazarded (failure to zigzag) and culpable inefficiency in the performance of duty (delay in ordering abandon ship).⁴⁴⁵ After a well-documented deliberative process, Secretary Forrestal referred these charges on 29 November 1945.⁴⁴⁶

Captain McVay's court-martial was conducted at the Washington Navy Yard from 3-19 December 1945 and was open to the public.⁴⁴⁷

442. When invited to comment on the Court of Inquiry and endorsements before the disposition of charges had been determined, Captain McVay declined to do so in a letter to the Chief of Naval Personnel, dated 7 November 1945. This letter is included with the official record of the Court of Inquiry. Proponents of Captain McVay have criticized Vice Admiral Murray's participation in the investigation, since *Indianapolis* sank within COM-MARIANAS's area of responsibility. Neither Captain McVay nor his counsel challenged the composition of the Court of Inquiry, during the inquiry or afterwards. Neither McVay nor his counsel challenged the court's findings. No legal irregularity appears in the record of the Court of Inquiry. Courts of inquiry are investigative tools and were not legally related to courts-martial under the Articles for the Government of the Navy. No defect in the court of inquiry would have invalidated a subsequent court-martial. *Humphrey v. Smith*, 336 U.S. 695, 698 (1949). Even today, when such formal investigations are required before charges may be referred to a general court-martial, defects in a pretrial investigation are not jurisdictional and are waived if not raised by the accused before trial. See 10 U.S.C.S. § 832(d) (Law. Co-op. 1997) (UCMJ art. 32(d)); MCM, *supra* note 113, R.C.M. 405(k). Compare *Humphrey v. Smith*, 336 U.S. 695, 700 (1949) (Failure to conduct the pre-trial investigation required by Article 70 of the Articles of War does not affect jurisdiction of general courts-martial or subject them to reversal).

443. On 22 January 1946, the Judge Advocate General reviewed the record of the Court of Inquiry and determined that its proceedings, findings, opinions and recommendations, and the actions of the convening and reviewing authorities, were legal. Memorandum, Third Endorsement, The Judge Advocate General, Dep't of Navy (22 Jan. 1946) (JAG:I:JHK:nrc (SC)A17-24/CA35 Doc. No. 190398) endorsing the USS *Indianapolis* Court of Inquiry Report.

444. For example, he wanted to know why route "Peddie" was chosen, why no escort was assigned, why CTG 95.7 did not receive CinCPac's tasking message, and whether survival equipment should be designed more effectively. Kurzman suggests that King wanted to buttress the Navy's case against McVay by additional investigation. KURZMAN, *supra* note 387, at 215. An honest reading of King's endorsement, however, reveals that King had already decided that sufficient evidence existed to support charges against Captain McVay; King urged additional investigation into other matters.

445. The Judge Advocate General reviewed the record of the Court of Inquiry and the supplemental investigation conducted by the IG, and he met with the IG to consider what charges the evidence might support. He determined that the charges forwarded to the Secretary of the Navy were "the only ones that can be supported." Memorandum, The Judge Advocate General to the Secretary of the Navy (29 Nov. 1945).

McVay selected his own counsel,⁴⁴⁸ Captain John Cady, joined by two assistant defense counsel.⁴⁴⁹ The seven-member court was regularly com-

446. Kurzman's book is replete with melodramatic conjecture on the motivations of Fleet Admiral King and Secretary Forrestal and the interpersonal dynamics between King, Denfield (CHNAVPERS), Colclough (JAG), Snyder (IG) and Secretary Forrestal with respect to the decision to court-martial McVay. KURZMAN, *supra* note 387, at 189-91, 214-16, 249-53. See also LECH, *supra* note 387, at 174-201. For example, Kurzman suggests that Forrestal "had to avoid a scandal that might threaten his chances to keep the Navy independent" (KURZMAN, *supra* note 387, at 215), that he was reluctant "to defy Admiral King" (*id.* at 216) or "to lock horns" with him (*id.* at 253), describing the Secretary's actions with respect to the court-martial as taken "reluctantly" (*id.* at 216), "anxiously" (*id.* at 248), as he "clung" to the thread of a rationale (*id.* at 249), and "grappled with . . . doubts" (*id.* at 250) with a "troubled conscience" (*id.* at 249), and "deeply disturbed" (*id.* at 248). But after all, some "lower-grade officer" had to be punished to protect the Navy and the admirals (*id.* at 253). Admiral King could "never forget" that he had been "stained" once in his youth by a reprimand from McVay's father (Admiral McVay II), and now again "he was being haunted" by a McVay of the same name—"the admiral's son!" (*id.* at 191). "Something had to be done" (*id.* at 191). King, believing that McVay "would understand the necessity of sacrifice" (*id.* at 215), decided to "demolish" (*id.* at 215) him, first urging additional investigation to add more "flesh to the bones" of the case (*id.*), then, worried that more investigation might exonerate McVay and "troublemakers might demand that someone else be punished" (*id.* at 216), he urged that the court-martial proceed immediately (*id.* at 216). After all, "King wanted scapegoats" (*id.* at 253) and the "rotten system" (*id.* at 254) (the "system" that led the fight against the Japanese back across the Pacific) "had to depend on scapegoats to protect arrogant admirals like himself" (*id.* at 254). Secretary Forrestal, who "had been trying to appear tough since childhood," trying "to assert his manhood" (*id.* at 189), "powerless and dependent on others" (*id.* at 190), was unable to resist the wicked counsel of his ambitious partner. After all, Forrestal "feared there would be screams for blood, perhaps even his own." (*id.* at 190) Thus, the tortured pen of Kurzman's Forrestal was driven across the bottom of the charge sheet that sent Captain McVay, the "Toy of Treachery" (*id.* at 261), to a general court-martial. Lech is substantially more temperate in his description of the Navy Department's staffing of issues associated with the McVay court-martial, but he also imagines sinister motives from strikingly dispassionate documents. See, e.g., LECH, *supra* note 387, at 180.

447. Proponents of McVay purport to find something sinister and prejudicial in the fact that his court-martial was open to the public (e.g., KURZMAN, *supra* note 387, at 252), notwithstanding the fact that section 368 of NAVAL COURTS AND BOARDS, at 205 (1937), required that courts-martial sessions be conducted publicly, and the Sixth Amendment of the U.S. Constitution guarantees an accused the right to a "speedy and public trial." The Navy declassified numerous documents to ensure that Captain McVay's court-martial could be conducted publicly. See Letter from Judge Advocate Captain Ryan to The Secretary of The Navy (Nov. 28, 1945) (ltr TJR:lja 00-McVay, C.B./A17-20). Under current Rule for Courts-Martial 806, public trials are still the norm. MCM, *supra* note 113, R.C.M. 806, and Appendix 21, at A21-45. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (public has a First Amendment right to attend criminal trials). Public trials are generally thought to provide greater assurance that procedural rights of the accused will be observed. E.g., *United States v. Hershey*, 20 M.J. 433, 436 (C.M.A. 1985), *cert. denied*, 474 U.S. 1062 (1986) (public scrutiny of courts-martial promotes fairness of the process).

posed in accordance with the Articles for the Government of the Navy, consisting of Rear Admiral Wilder Baker (President), two commodores and four captains, all with considerable combat experience. On 3 December, the defense requested that trial be delayed until the next day, then reported it was ready to proceed on 4 December. The prosecution opened, called thirty-nine witnesses and introduced fifteen exhibits. Among the witnesses, the prosecution called was Commander Mochitsura Hashimoto, the Commanding Officer of submarine I-58. After defense objections to Hashimoto's legal competence to testify,⁴⁵⁰ the court concurred with the judge advocate that there was no basis in law to preclude testimony by Hashimoto.⁴⁵¹ Hashimoto's testimony was probably more favorable to Captain McVay than prejudicial, because he stated that zigzagging would not have made an appreciable difference in his attack.⁴⁵² The prosecution rested on 13 December. The defense opened on 14 December, called eighteen witnesses (including Captain McVay), and introduced one exhibit. A

448. United States v. McVay, Record of Trial, at 1 (Dec. 3, 1945) (on file with The Judge Advocate General of The Navy at JAG Code 20); NEWCOMB, *supra* note 387, at 192.

449. Captain D. C. White joined the defense as a fourth counsel and technical adviser on 13 December. *McVay* Record at 263.

450. *Id.* at 257 ("His nation is not of Christian belief."), 258 ("There are numerous questions as to the veracity of the Japanese as a race.").

451. *Id.* at 257-58, 264 (applicable law on the competence of witnesses and alternative oaths to be administered to them). See NAVAL COURTS AND BOARDS 163, ¶ 243 (1937) (presumption in favor of the competency of witnesses; burden of proof of incompetency is on the objecting party; matters in objection that do not establish incompetency of a witness may still affect his credibility; in preference to complete exclusion of witnesses, the court as factfinder should hear testimony and decide what credibility and weight it deserves). On the authoritativeness of the rules of evidence in Naval Courts and Boards, see NAVAL COURTS AND BOARDS 2, 130 (1937) (endorsed as authoritative by President Franklin D. Roosevelt, 5 Mar. 1937) ("No statute lays down the rules of evidence to govern naval courts-martial and the decisions of the department on such a question are the highest authority for a naval court-martial to follow."). The general rule of liberally allowing testimony and leaving issues of competence to the jury parallels civil practice. See, e.g., Fed. R. Evid. 601 (providing that "[e]very person is competent to be a witness except as otherwise provided in these rules."). See Fed. R. Evid. 601 (Advisory Committee's note). The Advisory Committee states that "this general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article," noting that issues of witness competency go to weight because "[a] witness wholly without capacity is difficult to imagine." Capacity to testify as a witness is not an issue of race, religion or alienage, but of physical or mental capacity to observe and communicate information.

452. Hashimoto's testimony also indicated that visibility was sufficiently good for him to track *Indianapolis* visually for over 27 minutes from the time of his first sighting at an approximate range of 10,000 meters until he launched torpedoes at a range of approximately 1500 meters. *McVay* Record at 267-69 (ranges and time), 275 (radar was not used because visibility was good), 276 (continuous periscope observation). Cf. HELM, *supra* note 387, at 207.

seasoned submarine commander called as an expert by the defense, Captain Glynn Donaho, testified that zigzagging would not defeat a proficient submarine attack. Captain Donaho admitted on cross-examination, however, that zigzagging did make targeting more difficult and could increase the chance of evading torpedoes after they had been launched. The defense rested on 18 December. Both sides made closing arguments and the court retired to deliberate.

The court found Captain McVay guilty of Charge I, through negligence suffering a vessel to be hazarded, and not guilty of Charge II, culpable inefficiency. After a brief sentencing hearing, at which the defense introduced Captain McVay's outstanding record of service, the Court sentenced him to lose 100 lineal numbers in his temporary grade of Captain and 100 lineal numbers in his permanent grade of Commander.⁴⁵³ The members of the Court joined unanimously in recommending that the reviewing authority exercise clemency, in view of Captain McVay's outstanding previous record. In accordance with ordinary post-trial procedures, the Judge Advocate General reviewed the record of trial and determined that the proceedings, findings, and sentence were legal. The Chief of Naval Personnel and Admiral King recommended that the Secretary remit the sentence and restore Captain McVay to duty. On 20 February 1946, Secretary Forrestal approved the proceedings, findings and sentence, but he ordered that the sentence be remitted in its entirety and that Captain McVay be returned to duty.

Reassigned as Chief of Staff for Commander, Eighth Naval District, New Orleans, Captain McVay served in that capacity until he retired with 30 years of service on 30 June 1949. He was placed on the retired list in the grade of Rear Admiral. Rear Admiral McVay committed suicide on 6 June 1968, leaving no suicide note or other explanation.

1. *The Bertolet Letter*

Recent inquiries from Representatives Floyd Spence and Timothy Holden enclosed an unsigned letter from "Leon J. Bertolet," indicating that he was a surviving crew member of *Indianapolis*.⁴⁵⁴ The letter from Mr. Bertolet stated numerous specific grievances with the treatment of Captain McVay. The letter stated that Captain McVay had been convicted of "der-

453. Loss of lineal numbers places an officer lower in the order of seniority among officers of the same grade and could delay eligibility to participate in the selection process for promotion to the next grade.

eliction of duty" and had been reduced in rank. The Uniform Code of Military Justice first introduced the offense of "dereliction of duty" in 1950.⁴⁵⁵ Captain McVay's court-martial convicted him of suffering a vessel to be hazarded, and did not reduce him in rank but sentenced him to lose numbers, a sentence never imposed. Mr. Bertolet's letter also attributed Captain McVay's suicide to the Navy's use of him as a "scapegoat." Critics of the McVay court-martial have made this allegation before but have never presented any evidence to support it. It is equally possible that Captain McVay succumbed to his own sense of personal responsibility for the *Indianapolis* tragedy, or that he was distressed over some completely unrelated issue. The letter also states that crew members of *Indianapolis* have petitioned Congress to have Captain McVay's rank restored. Not only was Captain McVay never reduced in rank, but he was retired as a Rear Admiral. Finally, Mr. Bertolet's letter alleged that Congress's failure to act on requests from "we survivors"⁴⁵⁶ is attributable to shame over *Indianapolis*'s connection to the atomic bombing of Japan. This allegation appears to have been raised for the first time in Mr. Bertolet's letter.

2. Appropriateness of the Navy's Disposition of Captain McVay's Case

Congressman Jacobs' letter raises broader issues of the propriety and legality of the Navy's disposition of Captain McVay's case. Orion Pictures has purchased the film rights to Dan Kurzman's novel, *Fatal Voyage*, and more broad-based inquiries can be expected if the film is completed and released.⁴⁵⁷ Popular accounts of Captain McVay's court-martial and the decision-making process that led to the referral of charges do not reflect understanding of applicable law, the uniqueness of command accountability and the discretion of courts-martial convening authorities in the military. An in-depth exposition of the unique military law applicable

454. The surname "Bertolet" does not appear in *Indianapolis*'s final sailing list of 30 July 1945 (HELM, *supra* note 387, at 213-43; KURZMAN, *supra* note 387, at 287-300), nor in the list of survivors (NEWCOMB, *supra* note 387, at 285-94; KURZMAN, *supra* note 387, at 287-300). The surname "Bertolet" does not appear in the official crew lists in exhibit 20 of the Court of Inquiry. Mr. Bertolet must have served aboard *Indianapolis* at some time before her final voyage.

455. The comparable offenses that existed under the Articles for the Government of the Navy were "neglect of duty" and "culpable inefficiency in the performance of duty." See *supra* notes 151-53.

456. See *supra* note 454.

457. E.g., Bonnie Britton, *Film May Clear Reputation of Warship Captain*, INDIANAPOLIS STAR, Aug. 3, 1995, at C01; Orion Pictures Looks Forward to Making "Fatal Voyage," BUSINESS WIRE, Aug. 1, 1995.

to Captain McVay's case has long been needed to demonstrate the legality and appropriateness of the Navy's disposition of charges against Captain McVay.

B. The Doctrine of Command Accountability

Kurzman's research revealed that it had occurred to Captain McVay, an experienced naval officer, that he would be called to account for the sinking of *Indianapolis* as early as the moment he watched the ship disappear beneath the surface of the sea,⁴⁵⁸ an expectation he later repeated to the *New York Times*: "I was in command of the ship and I am responsible for its fate."⁴⁵⁹ As he stated when testifying at his court-martial, "I know I can not shirk the responsibility of command."⁴⁶⁰

The traditional scope of duties and accountability that attach to command at sea has no parallel in the military or civilian spheres. Navy regulations in effect in 1945 provided that the commanding officer "is always responsible for the safe conduct of his ship."⁴⁶¹ Current Navy regulations have continued the tradition of strict command accountability:

The responsibility of the commanding officer for his or her command is absolute While the commanding officer may, at his or her discretion, . . . delegate authority to subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of continued responsibility for the safety, well-being and efficiency of the entire command.⁴⁶²

The doctrine of accountability holds that officers in command may be made to answer for failures within their commands, whether they were active participants in a mishap or not.⁴⁶³ The doctrine applies most

458. KURZMAN, *supra* note 387, at 92 ("[I]t would be much easier if I go down. I won't have to face what I know is coming after this.").

459. *Id.* at 211; also quoted in LECH, *supra* note 387, at 161.

460. *United States v. McVay*, Record of Trial, at 362 (Dec. 3, 1945) (on file with The Judge Advocate General of The Navy at JAG Code 20).

461. Navy Regulations, art 880(5), quoted in *McVay* Record at 372.

462. Navy Regulations, art. 0802 (1990). See Navy Regulations, art. 182(6) (1920) (similarly absolute).

emphatically to command at sea, and has been variously expressed in naval writings. For example:

The Department considers that the good of the Naval service requires the commanding officer of every Naval vessel to be held to very strict responsibility for the safety of the ship and its officers and men.⁴⁶⁴

A vital element in the equipment of an officer for command is a complete appreciation on his part of his full responsibility for the safety of his ship at all times.⁴⁶⁵

As Senator Malcolm Wallop explained:

Th[e] principle of command responsibility is the bedrock upon which all military discipline rests. It is particularly prominent in the U.S. Navy, which holds the commander of a vessel accountable if his ship runs aground or collides with another ship, even if he is not on the bridge at the time.⁴⁶⁶

The doctrine of command accountability is most strictly applied to command at sea in recognition of the fact that naval vessels frequently operate independently, far from sources of assistance, in an environment

463. See, e.g., *United States v. Day*, 23 C.M.R. 651, 656-57 (N.M.B.R. 1957) (conviction of commanding officer for negligently hazarding a vessel affirmed, notwithstanding matters not reported to him by his subordinates, including their failure to post an anchor watch, failure to inform him of receipt of two weather messages, and failure to inform him of worsening of the weather). In accordance with Navy Regulations and "many years of custom and usage," "the responsibility of the commanding officer for his command is absolute . . ." *Id.* at 657. In accordance with the traditional rule, the failure of Captain McVay's subordinates to brief him on the *Wild Hunter*/U.S.S. *Harris* radio traffic, to inform him of changes in the weather, or to commence zigzagging in accordance with fleet doctrine, would not be exculpatory for him as the commanding officer of *Indianapolis*. In the *Day* case, the court specifically rejected the commanding officer's argument that he should not be held accountable for the errors of subordinate officers who had formal training, had sufficient experience to test their training, and had demonstrated ability to carry out their assigned duties.

464. NAVAL DIGEST, *Navigation*, para. 16, at 410 (1916), quoted in *United States v. MacLane*, 32 C.M.R. 732, 735 (C.G.B.R. 1962) and referred to as a source for the underlying standards in the offense of hazarding a vessel in MANUAL LEGAL BASIS, *supra* note 151, at 265.

465. Court-Martial Order 2, at 5 (1924), quoted in *MacLane*, 32 C.M.R. at 735.

466. Letter from Senator Malcolm Wallop to Mr. & Mrs. Edward Kimmel (Jan. 31, 1992).

made hostile by the elements or by enemies. Life at sea is surrounded by dangerous forces on the ship and around it. Mistakes and omissions can mean the death of all hands on board. The doctrine of command accountability inculcates vigilance, circumspection, independence, self-sufficiency, resourcefulness and diligent husbanding. It forces the commanding officer to turn every opportunity to his advantage, to ensure that his ship is in the optimum material condition possible, and that his subordinates are well-trained, disciplined and properly qualified to assume duties entrusted to them. No one is in a better position to ensure the safety of a ship than its commanding officer. He must take aggressive measures to ensure the adequacy of off-ship support and on-ship proficiency, and not be lulled into a sense of complacency based on confidence in others. A commanding officer operating under such a principle is more likely to achieve the ultimate goal that lies behind the accountability doctrine—maximum possible readiness and efficiency. No less should be expected when the object of command at sea on a ship-of-the-line is war. "The complete responsibility of a commanding officer for his command has always been one of the cornerstones of any naval service."⁴⁶⁷ Captain McVay's routing instructions for the last voyage of *Indianapolis* cautioned that "Commanding Officers are at all times responsible for the safe navigation of their ships."⁴⁶⁸

While it is true that off-ship support activities should also be held to high standards, it would unacceptably dilute the principle of command accountability to allow commanding officers of warships to cite the collateral shortcomings of others as an excuse for their own, separate deficiencies. Accountability is not an all-or-nothing concept. Each commander is separately responsible for his own deficiencies, without regard to the culpability of others or the discretionary decisions made by the chain of command in deciding what measures to take in the wake of a multiple-fault disaster. The doctrine of command accountability, however, does not *require* that punishment be imposed for command defects; instead, it exposes a commander to the *risk* of punishment or administrative sanctions, based on the circumstances of the case and the discretion of his superiors. Sanctions available to superior commanders range from private censure through relief from command and nonjudicial punishment to referral of charges to a court-martial. Moreover, different superior officers have different disciplinary and enforcement policies, and they are afforded

467. *United States v. Sievert*, 29 C.M.R. 657, 668 (N.M.B.R. 1959).

468. *United States v. McVay*, Record of Trial, exhibit 1 (Dec. 3, 1945) (on file with The Judge Advocate General of The Navy at JAG Code 20).

discretion by law to make distinctions among different cases based on the circumstances of each case.⁴⁶⁹ Captain McVay's comments upon his fate after the sinking of *Indianapolis* demonstrated that he well understood the culture of command at sea in the Navy.

C. Through Negligence Suffering a Vessel of the Navy to be Hazardd

Among the offenses triable by courts-martial are many unique "employment-related" failures alien to the civilian setting, such as disobedience of orders, dereliction of duty, and improper hazarding of a vessel.⁴⁷⁰ From the earliest days of our nation, criminal liability has existed for one who negligently hazarded a vessel of the United States.⁴⁷¹ The offense of negligently hazarding a vessel and the strict doctrine of accountability associated with command at sea are closely related. The doctrine of accountability defines the duties of a commanding officer, breach of which may lead to criminal liability for negligently hazarding his vessel. As

469. The principles of prosecutorial discretion and selective prosecution are discussed more fully at *infra* notes 474, 481, and section III(D).

470. *Parker v. Levy*, 417 U.S. 733, 749 (1974) (specifically listing UCMJ article 110, improper hazarding of a vessel, as an example of unique, military-only offenses); *United States v. Day*, 23 C.M.R. 651, 655 (N.M.B.R. 1957) (hazarding a vessel "is a statutory offense . . . peculiar only to the armed forces"). Quoting from numerous precedents, the Supreme Court in *Parker v. Levy* stated that the superficially vague standards expressed in many military-only offenses must be understood in light of the unique customs and usages of the military:

[T]o maintain the discipline essential to perform its mission effectively, the military has developed what may not unfitly be called the customary military law or general usage of the military service Decisions of this Court during the last century have recognized that the longstanding customs and usages of the services impart accepted meaning to . . . seemingly imprecise standards [O]f questions not depending upon the construction of . . . statutes, but upon unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law.

417 U.S. at 743-48 (citations omitted).

471. Article 42 of the first Articles for the Government of the Navy, 1 Stat. 713 (1799), included a hazarding offense substantially similar to the offenses currently included in the UCMJ.

stated in *United States v. MacLane*,⁴⁷² a case involving conviction of a commanding officer for negligently hazarding a vessel,

It seems evident that the highest standards of performance of duty are demanded for the ship's safe operation; standards consonant with a full understanding of the substantial risks of loss of life and damage involved. The duty is to take all necessary precautions; to exercise due care and eternal vigilance. The criminal liability imposed is justified from the preventive point of view by the harmful conduct it seeks to deter.⁴⁷³

Captain McVay was convicted of an offense under Article 8(11) of Articles for the Government of the Navy, described as follows: "Such punishment as a court-martial may adjudge may be inflicted upon any person in the Navy . . . Who . . . , through inattention or negligence, suffers any vessel of the Navy to be . . . hazarded." The complete list of "elements" that the government was required to prove to establish guilt of the hazarding offense at Captain McVay's trial was simple:

1. That Captain McVay was "in the Navy;"
2. That he had a duty (*i.e.*, safety of his ship/antisubmarine evasive maneuvering);
3. Which he failed to discharge in the manner expected of a reasonably prudent person in his circumstances;
4. Which failure proximately caused
5. A vessel of the Navy
6. To be hazarded.

Elements 1 and 5 were easily established. Captain McVay was "in the Navy" and *Indianapolis* was a "vessel of the Navy." The core of the

472. 32 C.M.R. 732 (C.G.B.R. 1962).

473. *Id.* at 735.

McVay case was negligence in failing to zigzag, and whether this failure "hazarded" the ship.⁴⁷⁴

1. Negligence

Elements 2 and 3 reflect the traditional legal formula for "negligence," a concept derived chiefly from the law of torts.⁴⁷⁵ In the context

474. See *id.* at 735 ("The bare essentials for a conviction . . . are: proof that the vessel was hazarded, and proof that the hazarding was the proximate result of the accused's negligence."). A criminal trial is not a far-ranging investigation of a whole sequence of events; it is a focused inquiry into specific charges against a specific individual. The "elements" of a criminal offense, and of any affirmative defenses raised, define the scope of relevant evidence for trial. The government presents evidence that tends to establish the elements of the offense, or that tends to refute any affirmative defense raised by the accused. The accused presents evidence that tends to refute the existence of any of the elements of the offense, or that tends to establish an affirmative defense, such as alibi or entrapment. Evidence at Captain McVay's court-martial was properly limited to matters relevant to the specific charges referred for trial. See *McVay Record* at 68-69, 187; NEWCOMB, *supra* note 387, at 188, 204, 220. Critics of Captain McVay's court-martial have complained that the lead defense counsel, Captain John Cady, did not explore the fault of others for the sinking or delay in rescue, and he missed opportunities to elicit testimony about ULTRA intelligence. *E.g.*, LECH, *supra* note 387, at 196-198; von Doenhoff, *supra* note 398, at 8, 14. First, the collateral fault of others for such matters as the garbling of a message or the ambiguity of an order not to report the arrival of combatant vessels would have been irrelevant to the charges against Captain McVay. There is no defense recognized by criminal law that allows the accused to assert his innocence on the grounds that others were guilty of different misconduct. The concept of "comparative negligence" in civil law, by which degrees of fault are assigned to multiple actors in a single mishap, has no place in criminal law. Second, information about the sinking of U.S.S. *Underhill* and the ULTRA intelligence were irrelevant precisely because the government could not show that Captain McVay had reason to be aware of that information. The question at trial was whether Captain McVay was negligent, given what he did know or should have known, not whether he would have acted differently if he had been provided more information. The gist of Captain McVay's defense was that he made a reasonable mistake of fact about the existence of a submarine threat. To support such a defense, Captain Cady very adroitly elicited testimony from Captain Naquin that he considered the risk of enemy submarine activity to be "very slight," and from Captain Granum that he considered the risk to be "[n]o more than a normal hazard that could be expected in wartime." *McVay Record* at 329-30, 332; LECH, *supra* note 387, at 195-97. This testimony tended to *negate* one of the key "elements" of the government's case—that Captain McVay should have known a sufficient submarine threat existed to warrant zigzagging in accordance with fleet doctrine. However, the court considered the information available to Captain McVay and found it sufficient to indicate the presence of a submarine threat. Critics of Captain McVay's court-martial have demonstrated profound misunderstanding of fundamental principles of criminal law, suggesting that everyone's responsibility for the whole *Indianapolis* tragedy should have been aired at Captain McVay's court-martial. The issues on trial under the hazarding charge at Captain McVay's court-martial were limited to the "elements" of the offense, listed above.

of hazarding a vessel, negligence means the following:

[F]ailure to exercise the care, prudence, or attention to duties, which the interests of the government require a prudent and reasonable person to exercise under the circumstances. This negligence may consist of the omission to do something the prudent and reasonable person would have done, or the doing of something which such a person would not have done under the circumstances. No person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or order.⁴⁷⁶

Captain McVay's "duty" as the commanding officer of a warship, and whether he fell below the standards expected of a reasonably prudent commanding officer in executing that duty, were questions that could only be

475. *E.g.*, RESTATEMENT (SECOND) OF TORTS § 282 ("Negligence is conduct which falls below the standard established by law for the protection of others . . ."), § 283 (The standard of conduct expected is that of a "reasonable man under like circumstances."), § 284(b) (failure to perform an act for the protection of others "which the actor is under a duty to do") (1977).

476. MCM, *supra* note 113, ¶ 34c(3) (defining terms applicable to UCMJ article 110, improper hazarding of a vessel). UCMJ article 110 derived from the hazarding offenses in the Articles for the Government of the Navy. MANUAL LEGAL BASIS, *supra* note 151, at 265; *United States v. Roach*, 26 M.J. 859 (C.G.C.M.R. 1988), *aff'd*, 29 M.J. 33 (C.M.A. 1989); *United States v. Adams*, 42 C.M.R. 911 (N.M.B.R. 1970).

answered by application of the customs and usages of the Navy, as determined by the senior officer members of the court-martial.⁴⁷⁷

As discussed above, Captain McVay's duty as commanding officer was extremely demanding. Navy Regulations provided specifically that the commanding officer "is always responsible for the safe conduct of his ship."⁴⁷⁸ Compliance with fleet doctrine on anti-submarine evasive maneuvering was part of Captain McVay's duty to take precautions for the safety of his ship. Noncompliance with this doctrine was the specific breach of duty alleged in the charge before Captain McVay's court-martial. Because applicability of the fleet doctrine on evasive maneuvering was contingent upon visibility and the presence of a submarine threat, the prosecution opened a detailed factual inquiry into these matters at trial.⁴⁷⁹ Ultimately, the judgment of the court reflected a conclusion that the conditions of visibility and indications of a submarine threat were such that *Indianapolis* should have been zigzagging.

Under traditional concepts of negligence, an individual generally may not be held responsible for information that a reasonable person under similar circumstances would not have reason to possess.⁴⁸⁰ Whether *Indianapolis* should have been zigzagging depended on whether sufficient

477. See, e.g., *United States v. MacLane*, 32 C.M.R. 732, 738 (C.G.B.R. 1961):

Since the officers of the service are the best judges of what constitutes due care and prudence aboard a vessel . . . , it is peculiarly within the province of the court-martial to say whether or not on the evidence adduced in the particular case before it, blameworthy and punishable negligence existed.

The civil courts show great deference to court-martial determinations based on customs and usages of the service. See *Parker v. Levy*, 417 U.S. 733, 743-48 (1974); *Carter v. McClaghry*, 183 U.S. 365, 401 (1902); *Smith v. Whitney*, 116 U.S. 167, 178 (1886) ("[O]f questions . . . depending upon . . . unwritten military law or usage, within the jurisdiction of courts-martial, military or naval officers, from their training and experience in the service, are more competent judges than the courts of common law.").

478. *McVay Record* at 372 (quoting NAVREGS 880(5)).

479. See *supra* notes 407-12, 422, 423 & *infra* note 482.

480. See, e.g., MODEL PENAL CODE § 2.02(2)(d) (Official Draft and Revised Comments 1985) (defining negligence in terms of circumstances knowable to the accused); BLACK'S LAW DICTIONARY 933 (5th ed. 1979). The definition of negligence applicable to improper hazarding of a vessel included consideration of the unique circumstances of the accused. NAVAL COURTS AND BOARDS 133, ¶ 153 (1937) ("The degree of care and caution to avoid mischief required to save from criminal responsibility . . . is that which a man of ordinary prudence would have exercised *under like circumstances*." (emphasis added)). The same individualized, circumstantial standard still applies. MCM, *supra* note 113, ¶ 34c(3) (defining terms applicable to UCMJ article 110, improper hazarding of vessel).

information was available to indicate the existence of a submarine threat. Although it is entirely consistent with traditional notions of the duties of a commanding officer to charge Captain McVay with knowledge of intelligence available on board his own ship, it would have been unreasonable to attribute knowledge of the ULTRA intelligence to him. Evidence that would have indicated the existence of a submarine threat was properly limited at Captain McVay's court-martial to those matters *which he had reason to know*. Evidence of the ULTRA intelligence would have been irrelevant and inadmissible.⁴⁸¹ Ultimately, the court-martial found sufficient evidence of a submarine threat in the information available to Captain McVay, as cataloged by the Judge Advocate in his closing argument.⁴⁸² The independent committee of attorneys that reviewed Captain McVay's court-martial for Senator Lugar examined the Record of Trial and found that sufficient evidence existed to support the judgment of the court:

There was sufficient evidence to conclude that Captain McVay knew or should have known of a hostile submarine presence in the immediate vicinity of the course of the *Indianapolis* as it was proceeding to the Philippine Islands.

. . . . There was sufficient evidence to conclude that Captain McVay was not in compliance with the naval regulation regarding "zigzagging" given the weather conditions on the night of the incident.⁴⁸³

The remaining issue is whether Captain McVay's failure to discharge his duty caused *Indianapolis* to be hazarded.

2. *Hazarding by Failure to Zigzag*

Whether a ship is hazarded or "at risk" at a particular time under particular circumstances is a question of external fact unrelated to individual culpability.⁴⁸⁴ A ship is "hazarded" if it is placed at risk, without regard to ultimate harm.⁴⁸⁵ Whether *Indianapolis* was "hazarded" by failure to zigzag, then, is not a question of ultimate blame for her sinking.⁴⁸⁶ Based on evidence of submarine activity in the vicinity of route "Peddie," including I-58, the members of Captain McVay's court-martial found that *Indianapolis* had been placed at risk, or hazarded (element 6). *Indianapolis* was hazarded before I-58 detected her, and would have been hazarded if I-58 had never detected her. This perpetrator-neutral fact could have been the result of any number of contributing causes, but the only question of cau-

sation before the court was whether failure to zigzag was, legally, the proximate cause of hazarding (element 5).⁴⁸⁷ The question was *not* whether

481. Failure to provide Captain McVay ULTRA intelligence, or a sanitized summary of it, might indicate that others shared some measure of fault for the ultimate fate of *Indianapolis*, but the untried fault of others would not have been exculpatory for Captain McVay under the charges brought against him. A court-martial, like any criminal trial, is not a trial of an incident but of specific charges brought against an individual. The potential contributory fault of others in the Indianapolis tragedy was not on trial at Captain McVay's court-martial. The only possible purpose for introducing ULTRA evidence in defense would have been to urge the members of the court-martial to "punish" the Navy for not court-martialing others by acquitting Captain McVay—manifestly contrary to their duty to try the specific charges before them, based on evidence relevant to those charges. It is often true that in a single course of events many separate offenses by many actors can be identified. The law does not excuse some actors for their own, separate offenses even when the greater offenses of others go unpunished. For example, in multiple perpetrator criminal cases, the acquittal or non-prosecution of principal offenders does not entitle accessories to acquittal or the dismissal of charges based on their own, separate conduct. See *Standefer v. United States*, 447 U.S. 10, 14-26 (1980) (discussing the prevailing rule in the states, adopted by federal legislation as early as 1909); 18 U.S.C.S. § 2 (Law. Co-op. 1997); *United States v. Sievert*, 29 C.M.R. 657, 664-65 (N.M.B.R. 1959); WAYNE R. LAFAVE AND AUSTIN W. SCOTT, *HANDBOOK ON CRIMINAL LAW* 517 (1972) ("[I]t is now generally accepted that an accomplice may be convicted notwithstanding the fact that the principal in the first degree has been acquitted or has not yet been tried."). Cf. 10 U.S.C.S. § 877 (Law. Co-op. 1997) (UCMJ art. 77). The multiple perpetrator severability rule has established that even minor actors may not avoid liability for their own conduct by citing the greater fault of others in the same offense. The concept of "separate fault" is even stronger where separate offenses are involved. The following examples might help to explain the irrelevance to Captain McVay's hazarding offense of the failure to provide ULTRA intelligence:

1. The driver of an automobile is traveling at twice the speed limit when a maintenance worker suddenly emerges in the middle of the road from a manhole cover and is killed by the driver's automobile. Other maintenance workers who were responsible for placing caution signs and barricades along the road had failed to do so. The driver could still be fined for speeding or reckless driving without regard to investigation or prosecution of any of the parties for negligent homicide. Whether the workers responsible for placing the signs and barricades were tried for their dereliction or not would have no bearing on a speeding or reckless driving charge. Even if the negligent workers were tried and convicted for failure to place barricades, proof of their offenses would not be exculpatory with respect to a speeding or reckless driving charge.

2. The commanding officer of a submarine is conning the submarine at a speed and depth that places the submarine outside the peacetime "safe-operating envelope" (SOE) prescribed by submarine operational doctrine when the submarine strikes an uncharted submerged mountain and is seriously damaged. Information is later discovered that the National Imagery and Mapping Agency had hydrographic survey information indicating the presence of the mountain and negligently failed to include the mountain on charts provided to the submarine. The commanding officer can still be convicted of negligently hazarding his vessel without regard to the collateral fault of cartographers, based solely on failure to observe the SOE. The offense of hazarding a vessel is complete if the vessel was negligently placed *at risk of harm*, without regard to any specific harm that resulted.

failure to zigzag was the proximate cause of *Indianapolis's* sinking, but whether failure to zigzag placed *Indianapolis* at risk.

Whether failure to zigzag placed *Indianapolis* at risk depends on whether zigzagging contributes to the survivability of a ship with respect to submarine attack. The testimony of Commander Hashimoto and Captain Donaho was equivocal on this question. Captain McVay's counsel attempted to show that zigzagging would not effectively preempt submarine attack. The absolute effectiveness of zigzagging, however, was not the issue. The real issue was whether failure to zigzag increased the likelihood or risk of effective submarine attack. Standing fleet doctrine on zigzagging⁴⁸⁸ reflected the institutional judgment of the Navy that zigzagging did contribute to ship safety in submarine waters—a powerful element of proof.

3. The Value of Zigzagging

Whether proficient submarine commanders can still effectively prosecute a zigzagging surface target does not mean that zigzagging is useless. Zigzagging makes submarine targeting of a surface vessel more difficult, and a zigzagging target can evade torpedoes once they are fired.⁴⁸⁹ Zigzagging increases the chances of survival. A commanding officer should take every possible tactical measure to increase the opportunity for his ship

482. See McVay Record at 370: the Intelligence Annex to the Routing Instructions; the *Wild Hunter*/U.S.S. *Harris* sub-prosecution reports that Captain McVay admitted were received on board *Indianapolis* on 28 July; the Quartermaster's testimony that Captain McVay's night orders included mention of a submarine in a position that *Indianapolis* would cross by morning on 30 July. *Id.* at 187).

483. *Lugar Study*, *supra* note 386, at 8-9.

484. See MCM, *supra* note 113, ¶ 34c(1).

485. "The element of risk is the center around which the law of hazarding revolves." *United States v. Cunningham*, No. 84-3469, slip op. (N.M.C.M.R. July 31, 1985); *United States v. Buckroth*, 12 M.J. 697, 700 (N.M.C.M.R. 1981), *aff'd in part, rev'd in part on other grounds*, 13 M.J. 108 (C.M.A. 1982). To hazard a vessel is "to put the vessel in danger of loss or injury." *United States v. Krewson*, No. 86-1004, slip op. (N.M.C.M.R. June 16, 1986). The offense of hazarding a vessel "is thus unusual in criminal law in that it makes a person punishable for merely risking (hazarding) an item of property quite irrespective of resultant damage." *United States v. MacLane*, 32 C.M.R. 732, 735 (C.G.B.R. 1962). See also *United States v. Tusing*, 12 M.J. 608 (N.M.C.M.R. 1981), *aff'd in part, rev'd in part on other grounds*, 13 M.J. 98 (C.M.A. 1982); *United States v. Adams*, 42 C.M.R. 911 (N.M.C.M.R. 1970). The law has long been settled that "'hazard' means to put in danger of loss or injury." MCM, *supra* note 113, ¶ 34f(2); NAVAL COURTS AND BOARDS § 69 (1937). See McVay Record at 371 (proper definition of "hazarded" applied at Captain McVay's court-martial).

486. While it was and is permissible to include ultimate harm to a vessel in a hazarding specification (see NAVAL COURTS AND BOARDS, Specimen Charges and Specifications, at 125-126; MCM, *supra* note 113, ¶ 34f(2)), and proof of such ultimate harm "is conclusive evidence that the vessel was hazarded" (MCM, *supra* note 113, ¶ 34c(1)), the gravamen of any hazarding offense is that the accused placed the vessel at risk of harm, even if no harm ultimately resulted. The hazarding charge against Captain McVay did not include consummation by the sinking of *Indianapolis*. The government's burden was to demonstrate that failure to zigzag placed *Indianapolis* at risk with respect to any possible submarine contacts. Captain McVay's court-martial conviction did not attribute fault to him for the sinking of *Indianapolis*, the deaths of crew members, or delay in the rescue of survivors. The Judge Advocate General has stated this fact clearly before. See Letter from The Judge Advocate General of the Navy (Colclough), to Senator Tom Connally (May 15, 1946):

The conviction of Captain McVay by general court-martial held 3 December 1945 of Charge I, THROUGH NEGLIGENCE SUFFERING A VESSEL OF THE NAVY TO BE HAZARDED . . . did not establish that he was responsible for the loss of approximately eight hundred men who failed to survive the sinking of the INDIANAPOLIS.

As his special assistant, Edward Hidalgo, advised Secretary Forrestal, "the technical charge on which McVay was convicted was that of 'hazarding' his ship—not causing its loss or sinking." KURZMAN, *supra* note 387, at 249. The *Lugar Study* highlighted the distinction between Captain McVay's conviction and responsibility for the loss of *Indianapolis*:

It is important to note . . . that Captain McVay was not charged with taking or failing to take actions which resulted directly in the sinking of U.S.S. *Indianapolis*. While this may seem a "technical" distinction, it was an important one for our committee to keep in mind during the course of our review of the proceedings. Our committee also would submit that this is an important distinction to consider for those who review this report and choose to continue to discuss this incident Because of the sequence of events, to wit: the sinking of the U.S.S. *Indianapolis*, the instigation of the court martial proceedings, and the conviction of Captain McVay on a violation of a naval regulation that resulted in the "hazarding" of the ship, it is reasonable to assume that many consider Captain McVay to have been convicted of dereliction of duty that directly resulted in or caused the sinking of the U.S.S. *Indianapolis*. This is not the case. The nature of the charges, the penalty imposed, and the ultimate disposition of this case clearly indicate otherwise.

Lugar Study, *supra* note 386, at 4.

The distinction between "hazarding" a vessel and causing ultimate harm to it is not a "technical" distinction; it is a traditional, professional distinction of considerable consequence. The law of hazarding is intentionally prophylactic; it reflects such great solicitude for the safety of naval vessels that serious criminal sanctions, including death, are available to punish those whose conduct exposes naval vessels to mere inchoate risk. The deterrent message of the law is that "not only shall you not cause harm to a naval vessel; you shall not so much as expose her to the risk of harm." This policy would also apply to operationally inappropriate risks taken in combat. Failing to appreciate the aspect of risk in a hazarding offense, even well-known naval historians continue to perpetuate the error that "a court-martial convicted McVay of being responsible for this unnecessary tragedy." *E.g.*, ROBERT W. LOVE, JR., HISTORY OF THE UNITED STATES NAVY 1942-1991, at 276 (1992).

and crew to survive. Even if the ship must inevitably go down, then it should only be after available tactical measures to avoid such a fate have been employed.

In a submarine or ship engagement with torpedoes, there are three moving objects: the submarine, the ship, and the torpedoes. All three move relatively to each other. Timing is of the essence. Torpedoes used during World War II were not steerable and did not employ acoustic seekers. Torpedoes were launched on a fixed course at a fixed speed⁴⁹⁰ and had to impact a moving target along a straight line. To employ such torpedoes successfully, first a submarine had to determine the course, speed and range of the surface target; then it had to maneuver into an appropriate attack position. Finally, the course and speed settings for the torpedoes had to be determined to ensure that they would physically impact the target vessel along its track. Making the necessary calculations was not as simple as it might seem. If the target vessel was not maintaining a steady course and speed, the targeting problem could be significantly complicated.

As an illustration of the effect of zigzagging on a relative motion/intercept calculation, Figure 2 (at end of article) depicts a submarine at the center of the "maneuvering board." The submarine first detects a target bearing 090 at 10,000 yards.⁴⁹¹ The submarine observes the target for ten minutes and correctly determines its course and speed to be 262 at 17 knots. The submarine launches a torpedo at 48 knots, course 110, at time 11, to intercept the target at time 13. One minute before the torpedo was launched at time 11, the submarine did not observe that the target began a

487. See *United States v. Day*, 23 C.M.R. 651, 656-57 (N.M.B.R. 1957) which discusses proximate cause in hazarding a vessel:

The requirement of proximate cause is satisfied if the accused's act or omission "was one of several factors which all together caused the final result [T]he inquiry is not directed toward discovering the cause . . . but whether the accused's conduct was a cause There are innumerable cause factors in every case We are only interested in determining what part the conduct of the accused played in producing the result In the case of plural, concurrent or intervening causes, in relation to the determination of proximate cause, we consider the 'substantial factor' rule as providing the best yardstick—the act of the accused must have been a substantial factor in producing" the result.

488. The doctrine is quoted *supra* at 424-26 and accompanying text.

489. See *McVay* Record at 337.

490. There were only a few preset speeds which could be selected, limiting the choices of ranges and bearings to the target when a torpedo could be launched to intercept it.

491. Hashimoto first observed *Indianapolis* bearing 090, at an estimated range of 10,000 meters.

20° zig to port (or starboard) at time 10. It is evident from the maneuvering board that the torpedo would miss the target. Even if a fan of six torpedoes were launched, with a spread of 2° between the center torpedoes, and 3° between the others (covering 14°),⁴⁹² at time 13 the torpedoes would cross the original firing solution track of the target along true bearings from the submarine ranging from 103° to 117°. All torpedoes would miss the target, regardless of the direction of the zig at time 10.⁴⁹³

The illustration in Figure 2 assumes that the submarine has calculated the course, speed and range of the target perfectly. Using night-time visual observations alone, such perfection would have been unlikely.⁴⁹⁴ Visual calculation of the range to a target requires an estimation of its mast-head height, which depends on correct identification of the class of the ship, which is also difficult to do at night. Hashimoto had ship silhouettes available to assist him with this determination, but he believed *Indianapolis* was an Idaho-class battleship.⁴⁹⁵ For the sake of convenience, the illustration also assumes that the submarine is stationary, which would make calculation of a targeting solution much easier. Adding a course and speed for the submarine would make a relative motion/intercept calculation even more complicated. Removing these simplifying assumptions made for the sake of illustration, zigzagging could be even more effective in complicating or evading a submarine attack. An infinite number of hypothetical submarine/ship engagements could be constructed along *Indianapolis*'s track, in which zigzagging might make a decisive difference. The finding that *Indi-*

492. See *McVay* Record at 269 (testimony of Hashimoto).

493. See *id.* at 338 (the Judge Advocate cross-examining Captain Donaho):

39. Q. [A]ssuming . . . you haven't gotten a new setup while she is on this course, this forty-five away from you, and then she changed, say, twenty more to the left and she makes seventeen knots all this time, and you are submerged; what effect would these changes have on the accuracy of your torpedo fire?

A. I would probably miss.

40. Q. Pardon?

A. I would probably miss.

494. See *id.* at 260 (Hashimoto believed *Indianapolis* was on course 260 at 12 knots, vice 262 at approximately 17 knots), 338 (Captain Donaho: "We fire spreads to take into consideration errors in course and errors in speed.").

495. *Id.* at 271 (Hashimoto did not use the book of silhouettes before firing); *supra* note 431 (report of sinking a battleship).

anapolis was placed at risk did not depend on any particular ship/submarine positions.

In the illustration, several things could happen at time 13 when the hypothetical fan of torpedoes misses the zigzagging target. The ship could immediately turn towards the line-of-bearing from which the torpedoes were launched, presenting a "narrow aspect" to the submarine, minimizing the surface area of the ship that could be targeted. The ship could drop depth charges or accelerate to flank speed and clear the attack datum immediately.⁴⁹⁶ The ship could transmit a message reporting the attack and her exact latitude and longitude. Radar operators and lookouts alerted after a near-miss torpedo attack could search for and possibly detect a periscope. Location of the periscope could facilitate a counterattack or even more effective evasive maneuvering. If the submarine suspected that it had been detected, it might crash-dive to avoid counterattack, abandoning its mission. Finally, if the visibility were intermittently good and poor, as clouds intermittently blocked the moon (as was the case on the night of 29 July 1945), the submarine's ability to target the ship visually might be impeded by poor visibility after an initial failed attack. If a World War II era submarine were able to reposition and launch a successful re-attack, which is not at all certain, given the slow maximum speeds of Japanese diesel submarines, at least the ship might have fought a tactically honorable engagement. There might have been more time to send a message reporting the attack. Whatever advantage zigzagging might have provided in any number of hypothetical submarine engagements on the night of 29 July 1945, the crew of *Indianapolis* was denied that advantage, contrary, as the court found, to standing fleet doctrine. Captain McVay himself obviously attributed special significance to the fact that *Indianapolis* was not zigzagging; he insisted on reporting that fact from *Ringness* immediately upon being rescued.

Critics of Captain McVay's court-martial have argued that failure to zigzag was not an appropriate basis for his conviction by (1) impugning the tactical efficacy of zigzag maneuvering as an anti-submarine measure in general,⁴⁹⁷ (2) by arguing that zigzagging would not have defeated the

496. Hashimoto testified that his submarine could only make 7 knots submerged and 12 knots on the surface (where it would be vulnerable to counterattack). On the other hand, *Indianapolis* had just broken the world speed record from San Francisco to Pearl Harbor (LECH, *supra* note 387, at 6; KURZMAN, *supra* note 387, at 36 (averaging 29.5 knots)), and "no submarine could touch her at 24 knots" (NEWCOMB, *supra* note 387, at 42).

497. See, e.g., LECH, *supra* note 387, at 33, 172; KURZMAN, *supra* note 387, at 55, NEWCOMB, *supra* note 387, at 58.

attack on *Indianapolis* under the specific facts of the engagement, and (3) by arguing supersession of standing naval doctrine by pointing out that Captain McVay's routing instructions from CinCPac left zigzagging to his discretion. Consideration of applicable legal principles and the professional naval aspects of the case, however, reveal the weakness of these arguments.

First, commanding officers of naval vessels choose to deviate from standing operational doctrine⁴⁹⁸ or instructions at their own peril. No one is expected to commit suicide in obedience to doctrine—but the choice to deviate must be the right one when it is made. Individual officers are encouraged to contribute to the evolution of effective naval doctrine, and naval exercises are designed specifically to serve this purpose, but operational defiance of doctrine deemed obsolete by individual commanders is not part of the disciplined culture of the Navy. Military discipline would crumble under the individualistic theory of adherence to tactical doctrine suggested by McVay's proponents. Furthermore, arguments against the tactical efficacy of zigzagging are factually incorrect as a matter of relative motion science. Zigzagging was considerably more effective as a submarine evasion measure before the era of acoustic warfare and steerable, homing torpedoes, but it is still considered to be sufficiently effective to warrant continued inclusion in current Navy anti-submarine doctrine.⁴⁹⁹ Second, arguing that I-58 would have sunk the ship whether it was zigzagging or not presupposes that Captain McVay was held responsible for the sinking of the ship by not zigzagging. Whether zigzagging would have defeated submarine I-58's targeting of *Indianapolis* was not the issue at Captain McVay's court-martial. The members of the court-martial found Captain McVay responsible for placing the vessel at risk by not zigzagging, a finding applicable to any possible submarine threat along the track

498. The applicable doctrine on zigzagging was introduced as Exhibit 4 at Captain McVay's court-martial.

499. See U.S. DEP'T OF NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, 1 ALLIED TACTICAL PUBLICATION 1(C), at 2-23 to 2-25 (1983) (updated through Jan. 1998); U.S. DEP'T OF NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, ALLIED TACTICAL PUBLICATION 3(B), ANTI-SUBMARINE EVASIVE STEERING, paras. 101b & c, at 1-1 (1995) (updated through September 1997) (anti-submarine and anti-torpedo objectives of evasive steering); *id.* para. 106, at 1-2 (doctrine for evasive steering applies to independent ships in areas where there is a submarine threat); *id.* para. 115, at 1-7 (specific criteria applicable to ships in formation and ships steaming independently); U.S. DEP'T OF NAVY, OFFICE OF THE CHIEF OF NAVAL OPERATIONS, NAVAL WARFARE PUBLICATION 61, ANTI-SUBMARINE WARFARE, para. 2.1.2.6.2 (1990) ("Evasion"). In accordance with these references, not only is zigzagging still prescribed, but the condition of visibility is irrelevant in view of modern acoustic methods of submarine anti-ship warfare.

to Leyte.⁵⁰⁰ Finally, the fact that the CinCPac routing instructions left zigzagging to the discretion of Captain McVay did not relieve him from potential liability for the negligent exercise of his discretion. No commanding officer of a naval vessel could ever be freed by such an instruction from the criminally-enforceable professional standards relating to his duty, military law enacted by Congress, and the customs and traditions of the naval service. Civilian critics of the court-martial have read CinCPac's instruction as an absolute license to zigzag or not, as if it relieved Captain McVay of the duty to engage in sound operational practices to ensure the safety of his ship. Certainly, Captain McVay could not have been found guilty of an orders violation under Article 4 of the Articles for the Government of the Navy (disobedience of a lawful order of a superior officer), because he was not specifically ordered to zigzag, but he could most certainly be found guilty of culpable inefficiency or negligence in the manner in which he chose to exercise his discretion.⁵⁰¹

The attorneys commissioned by Senator Lugar to study the *McVay* case stated their "unanimous opinion that the determination that Captain McVay was guilty of violating a naval regulation that resulted in the hazarding of his ship was . . . supported by the weight of the evidence."⁵⁰² In particular, the *Lugar Study* examined the record of trial and found that

500. Members of the public often disagree with jury fact-finding and emphasize particular evidence that tends to prove or disprove a particular fact. The experienced senior officer members of McVay's court-martial found that not zigzagging caused *Indianapolis* to be hazarded. Both sides presented evidence on this issue at trial. The prevailing practice in courts throughout the United States allows the fact-finding province of a jury, or members of a court-martial, to be disturbed only upon the strongest showing of the inadequacy of evidence. For example, Rule for Courts-Martial 917(d) provides that:

[a] motion for a finding of not guilty shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

MCM, *supra* note 113, R.C.M. 917(d) (emphasis added). See also *Jackson v. Virginia*, 443 U.S. 307 (1979).

501. See MCM, *supra* note 113, ¶ 34c(3) (definitions applicable to improper hazarding of a vessel):

No person is relieved of culpability who fails to perform such duties as are imposed by the general responsibilities of that person's grade or rank, or by the customs of the service for the safety and protection of vessels of the armed forces, simply because these duties are not specifically enumerated in a regulation or order.

502. *Lugar Study*, *supra* note 386, at 5.

"[t]here was sufficient evidence to conclude that the actions of Captain McVay and his immediate subordinates, who were subject to his command, resulted in the hazarding of the *Indianapolis*."

D. Prosecutorial Discretion

The decisions to investigate or prosecute, and what particular charges to bring, have traditionally been the province of broad prosecutorial discretion.⁵⁰³ Prosecutors acting in their official capacity are "absolutely privileged" to initiate criminal proceedings.⁵⁰⁴ Prosecutorial decisions in the context of the federal government are generally entrusted to Executive Branch discretion.⁵⁰⁵ Many factors influence the exercise of such discretion, including the interest of the public.⁵⁰⁶ The great degree of discretion that exists in deciding the disposition of cases involving offenses committed by military officers is but one aspect of a total milieu of authority and discretion within which disciplinary personnel decisions are made in the military. The law of prosecutorial discretion applicable in the military is similar to the law applicable in the civilian setting, with the key difference that the commander⁵⁰⁷ is also a court-martial convening authority, and it

503. *E.g.*, *Borden-Kircher v. Hayes*, 434 U.S. 357, 364 (1978) (Public officials making decisions to prosecute exercise broad discretion.); JOSEPH F. LAWLESS, JR., PROSECUTORIAL MISCONDUCT § 1.09, at 11 (1985) ("[P]rosecutors enjoy broad discretionary powers to investigate and/or decline to investigate allegations of crime. For all intents and purposes, their discretion is unbridled."); *Id.*, § 1.14, at 14 ("[T]he prosecutor enjoys extremely broad discretion in the decision to indict or initiate criminal proceedings against a suspected wrongdoer and, to a large extent, that decision is unassailable.").

504. RESTATEMENT (SECOND) OF TORTS § 656 (1977).

505. *E.g.*, *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (The decision to indict or not "has long been regarded as the special province of the Executive Branch"); 10 Op. Off. Legal Counsel 68, 72-73 (1986) ("[N]either the judicial nor legislative branches may directly interfere with the prosecutorial discretion of the Executive Branch by directing the executive to prosecute particular individuals" (citations omitted)). See *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Confiscation Cases*, 74 U.S. (7 Wall.) 454, 457-59 (1869) (Decision to prosecute or abandon a case on behalf of the United States is discretionary.). See also *Morrison v. Olson*, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting) ("Governmental investigation and prosecution of crimes is a quintessentially executive function.").

506. Prosecutors, in exercising their discretion, are often responsive to public opinion. When an aroused public demands prosecution in a particular case, a more vigorous prosecution is likely. Newman F. Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. CRIM. L. & CRIMINOLOGY 770, 792-93 (1933). In many jurisdictions the prosecutor is a politically elected official.

is he who is endowed with the broad discretionary powers of the prosecutor under military law.⁵⁰⁸

No one has a right to compel the prosecution of others,⁵⁰⁹ nor is failure to prosecute others generally recognized as a defense. In both the military and civilian settings, "selective prosecution" is unlawful only if it is founded upon a constitutionally impermissible basis, such as race, sex, alienage, or retaliation for the exercise of First Amendment or other constitutional rights.⁵¹⁰ Mere failure to prosecute others does not establish the defense of selective prosecution.⁵¹¹ To sustain a defense of "selective prosecution," the accused must show that persons similarly situated were not prosecuted, and that the prosecuting authority intentionally based his decision on a constitutionally⁵¹² impermissible classification.⁵¹³ Moreover, the defense must be raised at trial or it is waived,⁵¹⁴ and the defendant "bears the heavy burden" of establishing a *prima facie* case.⁵¹⁵ Selective

507. Including the Commander in Chief and his deputies, the secretaries. 10 U.S.C.S. § 822(a) (Law. Co-op. 1997) (UCMJ art. 22(a)). The law in 1945 also specified that the President and the Secretaries of the Navy and of War were convening authorities. ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 38 (1930), reproduced in NAVAL COURTS AND BOARDS 465, ¶ B-40 (1937) ("General courts-martial may be convened . . . by the President, the Secretary of the Navy . . ."); TILLOTSON, *supra* note 114, at 17.

508. *E.g.*, NAVAL COURTS AND BOARDS 5, ¶ 13 (1937) (convening authority discretion to determine what charges will be referred to a court-martial).

509. *E.g.*, *Schulke v. United States*, 544 F.2d 453, 455 (10th Cir. 1976) (Appellant's attempt to force courts-martial of other service members rejected—decisions of military authorities whether to refer court-martial charges are not subject to judicial review.).

510. *Wayte v. United States*, 470 U.S. 598 (1984); *United States v. Hagen*, 25 M.J. 78, 83 (C.M.A. 1987), *cert. denied*, 484 U.S. 1060 (1988); *United States v. Means*, 10 M.J. 162, 165-66 (C.M.A. 1981). The Supreme Court has found the equal protection principle applicable to federal action through the Due Process clause of the Fifth Amendment. On the limited number of classifications prohibited in the exercise of prosecutorial discretion, see WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE, § 13.4, at 633 (2d ed. 1992).

511. *E.g.*, *United States v. Maplewood Poultry Co.*, 320 F. Supp. 1395 (D. Me. 1970); *United States v. Rickenbacker*, 309 F.2d 462 (2d Cir. 1962), *cert. denied*, 371 U.S. 962 (1963). See also *Oyler v. Boyles*, 368 U.S. 448 (1962). In *Oyler*, the Court held that the exercise of reasonable selectivity in enforcement does not deny equal protection to those prosecuted, declaring that "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." This is so, the Court stated, even where statistics may imply a policy of selective enforcement. The Court added that the defendant must prove that his prosecution was "deliberately based" on constitutionally impermissible discrimination. *Id.* at 456.

512. *Wayte*, 470 U.S. at 608 (Selective prosecution claims are judged according to Equal Protection Clause standards.); *Willhauck v. Halpin*, 953 F.2d 689, 711 (1st Cir. 1991) (Claim of selective prosecution must show that defendant's equal protection rights were violated.).

prosecution claims are seldom successful, even in death penalty cases involving lopsided racial statistics.⁵¹⁶ It is inconceivable that a legally sufficient case of selective prosecution could be made with respect to Captain McVay. As the only commanding officer of *Indianapolis* in late July 1945, he was not "similarly situated" with respect to anyone, and the charges brought against him are not similar to charges that might have been brought against anyone else who might have contributed to the *Indianapolis* tragedy. Finally, no evidence exists of intentional discrimination on a constitutionally impermissible basis, such as race or ethnicity. The general rule with respect to prosecutorial discretion is well-settled—prosecution authorities have "broad discretion to initiate and conduct criminal prosecutions," and "the decision to prosecute is particularly ill-suited to judicial review."⁵¹⁷

Unique aspects of criminal law in the military provide even greater support for the exercise of discretion by court-martial convening authorities. As the U.S. Supreme Court has stated, "The military constitutes a specialized community governed by a separate discipline from that of the civilian."⁵¹⁸ "[T]he special relationships that define military life have supported the military establishment's broad power to deal with its own personnel. The most obvious reason is that courts are ill-equipped to determine the impact upon discipline that any particular intrusion upon military authority might have."⁵¹⁹ In cases where military decisions affect-

513. See, e.g., *Government of the Virgin Islands v. Harrigan*, 791 F.2d 34, 36 (3d Cir. 1986); *Attorney General of the United States v. Irish People, Inc.*, 684 F.2d 928, 932 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 1172 (1983), *reh'g denied*, 460 U.S. 1056 (1983); *United States v. Berrios*, 501 F.2d 1207 (2d Cir. 1974); *United States v. Garwood*, 20 M.J. 148, 154 (C.M.A. 1985), *cert. denied*, 474 U.S. 1005 (1985).

514. E.g., *United States v. El-Amin*, 38 M.J. 563, 564 (A.F.C.M.R. 1993).

515. E.g., *United States v. Union Nacional de Trabajadores*, 576 F.2d 388, 395 (1st Cir. 1978).

516. E.g., *McCleskey v. Kemp*, 481 U.S. 279, 292-97 (1987).

517. See Katherine Lowe, *Project, Twenty-Second Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeal 1991-1992*, 81 GEO. L.J. 853, 1029-32 (1993) (citing *Wayte*, 470 U.S. at 607 and *Newton v. Town of Rumery*, 480 U.S. 386, 396 (1987)).

518. *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953).

519. *Chappell v. Wallace*, 462 U.S. 296, 305 (1983) (quoting Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 187 (1962)).

ing service members have been challenged, courts have shown great deference to the unique circumstances of military service.⁵²⁰

Central among the unique features of military life is the authority of senior officials in the chain of command to form judgments on the adequacy of the performance of subordinate officers in command. Where the law allows superior officials discretion to decide the disposition of cases involving perceived defects in an officer's performance, many different factors may influence the decision, including the experience of the officer, his or her past performance, seniority, specific noteworthy achievements, and such external factors as assessment of the impact on others of the officer's unsatisfactory performance. The threshold standard of evidentiary weight for referring charges to a court-martial is low. If a convening authority finds reasonable grounds to believe that a particular individual has committed an offense, he may refer charges against that individual to a court-martial.⁵²¹ The decision to refer particular charges to a court-martial is highly discretionary with individual military convening authorities. This type of discretion afforded convening authorities in the military inheres throughout the structure of the Uniform Code of Military Justice, and its predecessors, the Articles of War and Articles for the Government of the Navy. The courts have found the system of military justice consistent with the Constitution.⁵²²

Military law contains many criminal offenses related to obedience of authority and job performance, concepts totally alien in civilian employment. In *Parker v. Levy*, the Supreme Court further observed that there are

520. *E.g., Chappell*, 462 U.S. at 303 (Military personnel have no constitutional tort remedy against actions taken by their superiors.); *United States v. Stanley*, 483 U.S. 669 (1987) (In a case involving nonconsensual, experimental administration of LSD, the Court held that service members have no cause of action under the Constitution for injuries suffered incident to service.); *Feres v. United States*, 340 U.S. 135, 146 (1950) ("[T]he Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service."); *Orloff*, 345 U.S. at 93-94; *Martin v. Mott*, 25 U.S. (12 Wheat) 19 (1827) (Military decisions of superior officers are immune from civil suits by subordinates.); *Murphy v. United States*, 993 F.2d 871, 873 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1019 (1994) ("There are thousands of routine personnel decisions regularly made by the services which are variously held nonjusticiable or beyond the competence or jurisdiction of the court to wrestle with."). Courts traditionally have been reluctant to intervene in any matter which "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." *Shearer v. United States*, 473 U.S. 52, 58 (1985). The "complex, subtle, and professional military decisions as to the composition, training, equipping and control of a military force are essentially professional judgments . . ." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1983).

military cases "beyond the bounds of ordinary judicial judgment, for they are not measurable by our innate sense of right and wrong, of honor and dishonor, but must be gauged by an actual knowledge and experience of military life, its usages and duties."⁵²³ In accordance with the practice of the federal courts, such matters are generally left to the judgment of military authorities. It would be difficult to imagine matters more uniquely related to military customs and usage than the duties incident to command

521. The current *Manual for Courts-Martial* states the minimal standard for referral of charges as follows:

If the convening authority finds or is advised by a judge advocate that there are reasonable grounds to believe that an offense triable by a court-martial has been committed and that the accused committed it, and that the specification alleges an offense, the convening authority may refer it. The finding may be based on hearsay in whole or in part. The convening authority or judge advocate may consider information from any source and shall not be limited to the information reviewed by any previous authority The convening authority or judge advocate shall not be required before charges are referred to resolve legal issues, including objections to evidence, which may arise at trial.

MCM, *supra* note 113, R.C.M. 601(d)(1).

Generally accepted ethical standards for prosecution authorities reflect a similarly low threshold for the initiation of a prosecution. MODEL RULES OF PROFESSIONAL CONDUCT RULE 3.8(a) (1995) ("The prosecutor in a criminal case shall . . . refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."). The Supreme Court has articulated a similar standard: "so long as the prosecutor has probable cause to believe that the accused committed an offense . . . , the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). An action for the tort of malicious prosecution will not lie unless criminal charges were brought without probable cause and the plaintiff was acquitted. *See KEETON, supra* note 337, § 119, at 871; RESTATEMENT (SECOND) OF TORTS § 658 (1977) ("[C]riminal proceedings must have terminated in favor of the accused."). *See also Buckley v. Fitzsimmons*, 509 U.S. 259, 286 (1993) (Kennedy, J., concurring in part and dissenting in part) (cause of action for malicious prosecution depends on lack of probable cause to indict). "'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.'" *Brinegar v. United States*, 338 U.S. 160, 175 (1949), *quoting Carroll v. United States*, 267 U.S. 132, 161 (1925). The Articles for the Government of the Navy did not state a standard of evidentiary sufficiency for the referral of charges to a court-martial. Notwithstanding this fact, the Judge Advocate General carefully reviewed the evidence and advised Secretary Forrestal that it supported only the two proposed charges, and not other charges that had been considered previously. Memorandum, The Judge Advocate General of the Navy, to the Secretary of the Navy (29 Nov. 1945) (applying a "prima facie case" standard, a standard higher than "probable cause"). *See LECH, supra* note 387, at 181-82 (suggesting that trial on the zigzagging charge was an open-and-shut case, "over before it began," at this pre-referral deliberation phase—more than sufficient to meet the standard of "probable cause.").

at sea and the standards associated with the safe navigation of naval vessels.

As the *Lugar Study* concluded, "The decision to bring court-martial charges against Captain McVay was a decision appropriately within the scope of prosecutorial discretion."⁵²⁴ Stated less tentatively, the decision to refer charges against Captain McVay was one committed by law to the discretion of the Secretary of the Navy.⁵²⁵

E. Reviewability of Captain McVay's Conviction

Captain McVay was tried and convicted under the Articles for the Government of the Navy.⁵²⁶ The Articles for the Government of the Navy did not provide for appeals.⁵²⁷ Power to reverse a Navy conviction remained with the convening authority, who could be reversed only by the Secretary of the Navy or the President.⁵²⁸ Accordingly, once Secretary Forrestal took final action on the court-martial and the President did not intervene, the judgment was final. Captain McVay was not entitled to collateral review pursuant to a writ of habeas corpus because he was not sentenced to confinement.⁵²⁹ He was released and restored to duty. Nor was Captain McVay entitled to review in the Court of Claims because the sen-

522. Court-martial convening authorities play a decisive role throughout the military justice process, including decision-making under the following rules: MCM, *supra* note 113, R.C.M. 303 (preliminary inquiry); R.C.M. 304(b), 305 (pretrial restraint and confinement); R.C.M. 306 (initial disposition of offenses); R.C.M. 401 (disposition of charges); R.C.M. 404 (actions available to special court-martial convening authority); R.C.M. 407 (actions available to general court-martial convening authority); R.C.M. 502, 503 (selection and detailing of members of courts-martial); R.C.M. 601 (referral of charges); R.C.M. 702(b) (ordering depositions); R.C.M. 704 (grants of immunity); R.C.M. 705 (negotiating and entering pretrial agreements on behalf of the government); R.C.M. 1101 (temporary deferment of sentence to confinement); R.C.M. 1107 (action on findings and sentence). See *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1857) (The separate and distinct system of military justice is constitutional.); *Ex parte Reed*, 100 U.S. 13, 20 (1879) ("The constitutionality of the acts of Congress touching army and navy courts-martial in this country, if there could ever have been a doubt about it, is no longer an open question in this court.").

523. *Parker v. Levy*, 417 U.S. 733, 748 (1974) (quoting *Swaim v. United States*, 28 Ct. Cl. 173, 228 (1893)).

524. *Lugar Study*, *supra* note 386, at 6.

525. See ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 38 (1930); NAVAL COURTS AND BOARDS 5, ¶ 13 (1937) (convening authority discretion to determine what charges will be referred to a court-martial).

526. The Articles for the Government of the Navy was not a Navy regulation, but an enactment of Congress (Act of April 2, 1918, 40 Stat. 501), pursuant to constitutional authority (U.S. CONST. art. 1, § 8; amend. 5).

tence, as approved by the Secretary, did not affect his pay.⁵³⁰ Congress has "no power whatever" to revise or reverse a court-martial judgment.⁵³¹ In 1983 Congress limited the power of the military boards for correction of records in court-martial cases to corrections that reflect clemency and actions taken by reviewing authorities.⁵³² The Board for Correction of Naval Records, therefore, does not have authority to set aside a court-martial conviction.⁵³³ At this point in time, the only power possessed by military authorities over a final judgment fifty years old is the power of the Secretary of the Navy to remit or suspend any unexecuted part of Captain

527. The Supreme Court has consistently held that the Constitution does not require that systems of criminal justice provide for appellate review of convictions. *See, e.g., McKane v. Dunston*, 153 U.S. 684 (1894); CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, *CRIMINAL PROCEDURE* 690-91 (1986). Until the 1984 Military Justice Amendments provided for review of courts-martial by the Supreme Court by writ of certiorari (*see* 10 U.S.C.S. § 867a (Law. Co-op. 1997)), the Court held that federal courts had no jurisdiction to hear direct appeals or petitions from courts-martial. *E.g., Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863) (writ of certiorari from courts-martial not provided for in the Constitution nor in the statutes); *In re Vidal*, 179 U.S. 126 (1900) (same). *Cf. In re Yamashita*, 327 U.S. 1, 13-14 (1946) ("Correction of their [i.e., courts-martial] errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.").

528. ARTICLES FOR THE GOVERNMENT OF THE NAVY, art. 54 (1930); NAVAL COURTS AND BOARDS 243, ¶ 471 (1937) (Convening authority of a court-martial is the reviewing authority.); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950) (Correction of any errors in a court-martial "is for the military authorities which are alone authorized to review its decision."); *Carter v. McClaughry*, 183 U.S. 365, 385 (1902) (Court-martial convening authority was "the reviewing authority, and the court of last resort."); *Swain v. United States*, 28 Ct. Cl. 173, 217 (1893), *aff'd*, 165 U.S. 553 (1897):

The proceedings of . . . military tribunals can not be reviewed in the civil courts. No writ of error will lie to bring up the rulings of a court-martial. Even in the trial of a capital offense the various steps by which the end is reached can not be made the subject of judicial review. The only tribunal that can pass upon alleged errors and mistakes is the commanding officer . . .

529. *See, e.g., United States v. Augenblick*, 393 U.S. 348, 350 (1969) (Habeas corpus "not available to respondent . . . because he was . . . not imprisoned . . ."); 28 U.S.C.S. § 2241 (Law. Co-op. 1997) (Writ of habeas corpus not available unless petitioner is "in custody"); 16 FED. PROC., L. ED. §§ 41:12 to 41:34 (Supp. 1995) (meaning of "in custody").

530. Back-pay suits under 28 U.S.C.S. § 1491 have long been an alternative method of collaterally attacking a court-martial judgment. *See United States v. Augenblick*, 393 U.S. 348, 349 n.2, 350-52 (1969); *Cooper v. United States*, 20 Ct. Cl. 70 (1990). The limited methods by which courts-martial may be collaterally reviewed in federal courts are discussed in *Brown v. United States*, 365 F. Supp. 328 (E.D. Pa. 1973).

531. *See, e.g., BERDAHL, supra* note 6, at 142.

532. 10 U.S.C.S. § 1552(f) (Law. Co-op. 1997).

533. *See Cooper v. Marsh*, 807 F.2d 988 (Fed. Cir. 1986); *Stokes v. Orr*, 628 F. Supp. 1085 (D.Kan. 1985).

McVay's sentence—but Secretary Forrestal has already remitted the sentence in its entirety.⁵³⁴ As provided by law, then, the judgment of conviction is "final and conclusive" and is "binding upon all departments, courts, agencies, and officers of the United States, subject only to . . . the authority of the President."⁵³⁵ The President has constitutional power to grant pardons,⁵³⁶ but in the post-conviction setting, "a pardon is in no sense an overturning of a judgment of conviction . . . ; it is an executive action that mitigates or sets aside punishment for a crime."⁵³⁷ Captain McVay received no punishment that may be set aside by pardon; moreover, the Pardon Attorney's office at the Department of Justice related that applications for posthumous pardons are not accepted under current Executive policy.⁵³⁸ The President, however, has unlimited discretion to grant pardons and may make an exception from his own policy as he sees fit.⁵³⁹ Given the current legal understanding of the limited effects of a post-conviction pardon, however, Captain McVay's conviction is not subject to

534. 10 U.S.C.S. § 876 (Law. Co-op. 1997).

535. *Id.*

536. U.S. CONST. art 2, § 2(1) (The President "shall have Power to grant Reprieves and Pardons for Offenses against the United States, except in Cases of Impeachment.").

537. *Nixon v. United States*, 506 U.S. 224, 232 (1993) (case involving former federal district court judge Walter Nixon). See also *Burdick v. United States*, 236 U.S. 79, 94 (1915) (A pardon "carries an imputation of guilt; acceptance [of a pardon] a confession of it."); *Carlesi v. New York*, 233 U.S. 51 (1914) (Pardon does not erase previous conviction.). See generally Henry Weihofen, *The Effect of Pardon*, 88 U. PA. L. REV. 177 (1939); Samuel Williston, *Does Pardon Blot Out Guilt?*, 28 HARV. L. REV. 647, 648 n.7 (1915) (federal cases taking narrow view of effect of pardon). According to Chief Justice Marshall, "A pardon is an act of grace . . . which exempts the individual, on whom it is bestowed, from the punishment the law inflicts for a crime he has committed." *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160-61 (1833) (emphasis added). Justice Field in *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 380 (1867) took a broader view of the effect of a pardon:

A pardon reaches both the punishment prescribed for the offense and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence.

This broad view of the pardon power is today, however, restricted to pardons granted before conviction. See CORWIN, *supra* note 33, at 187.

538. Telephone Interview with Keith Waters, Department of Justice, Pardon Attorney's Office (June 3, 1996). See Office of the Pardon Attorney, 28 C.F.R. §§ 0.35 to 0.36 (1997); Executive Clemency, 28 C.F.R. §§ 1.1 to 1.2 (1997).

539. *E.g.*, 20 Op. Att'y Gen. 330 (1892) (Pardon may be granted before or after conviction, and absolutely or upon conditions. "The ground for the exercise of the power is wholly within the discretion of the Executive.").

legal reversal by any recognized means. A Presidential pardon granted as an exception to policy would be chiefly ceremonial.⁵⁴⁰

F. Conclusion

Others than Captain McVay share fault in the *Indianapolis* tragedy, and history has recorded it that way. In fact, the popular literature and editorial commentary on the subject has been remarkably one-sided in highlighting the failings of others and trivializing the role of Captain McVay. Nowhere in such writings is there manifested an appreciation of the special role of the commanding officer of a naval vessel and the awesome responsibility entrusted to him. Uninformed popular literature has portrayed Captain McVay as a hapless victim—a role he never chose to play. The strict principle of accountability inherent in command at sea predates the United States and transcends all of the actors in the tragedy of *Indianapolis*. Each case involving loss or damage to a vessel is different. Sometimes punitive measures are invoked, at other times, they are not, but the risk of personal ruin for a commanding officer is always present.

Captain McVay was tried for a professional shortcoming by a panel of his peers and was awarded a commensurate professional sentence, loss of numbers, later remitted in view of his outstanding professional record. There was no reversible error in this process. It is too late now to call to account others who might have failed with respect to *Indianapolis*, but that is not an appropriate reason to reverse the conviction of Captain McVay. The most appropriate "remedy," if one is due, is to acknowledge other factors that contributed to the *Indianapolis* tragedy: Admiral Nimitz's staff issued an ambiguous order not to report the arrival of combat ships; the Navy had no procedure in place to monitor the non-arrival of warships; warships were routinely diverted by the operational chain of command without informing port officials; personnel in the Port Director's office at Leyte did not take the initiative to inquire into the delay in *Indianapolis*'s arrival; communications personnel on CTG 95.7's staff decoded a message incorrectly and communications personnel at Okinawa failed to provide a sailing report to CTF 95; the CinCPac staff failed to follow-up on an unconfirmed sinking report; personnel at COMMARIANAS and Commander, Philippine Sea Frontier, did not monitor the scheduled "chop" of *Indianapolis* between their regional sea commands; COMMARIANAS could have but did not reroute *Indianapolis* in view of the *Wild Hunter*

540. Cf. *Knote v. United States*, 95 U.S. 149, 153-54 (1877) (pardon confers no right to compensation).

reports;⁵⁴¹ ULTRA intelligence was not disseminated to the level where it might have been most useful;⁵⁴² ASW-capable escorts were being employed in a hotter combat zone to the north; standard transit routes were used instead of varying them to confuse the enemy; *Indianapolis* was a "soft" ship and had to sail routinely in a compromised condition of watertight integrity; and survival equipment was outdated or poorly designed. Fleet Admiral King saw to it that every one of these issues was thoroughly explored, apart from the culpability of Captain McVay, to ensure that no valuable "lessons-learned" were lost.⁵⁴³

A "scapegoat" is "one who is blamed or punished for the sins of others."⁵⁴⁴ The Navy has never attributed blame to Captain McVay for any of the above-listed contributory causes of the *Indianapolis* tragedy. He was tried on charges that arose uniquely from matters within his control as Commanding Officer of *Indianapolis*. The Navy's press release of 23 February 1946, reporting the results of the court-martial and the action on sentence by the Secretary, was accurate in every respect, including the clear statement that Captain McVay "was neither charged with, nor tried for, losing the *Indianapolis*."⁵⁴⁵ In another press release of the same date, the Navy provided a lengthy "Narrative of the Circumstances of the Loss of the USS *Indianapolis*,"⁵⁴⁶ which clearly stated the contributory fault of others.⁵⁴⁷ Anyone can speculate that there were surreptitious reasons for

541. Arguments that the *Wild Hunter* reports should have caused COMMARIANAS to reroute *Indianapolis* cut both ways—if these reports indicated that the risk of submarine activity was so great that *Indianapolis* should have been rerouted, then the same reports should also have indicated to *Indianapolis* that the risk of submarine activity was great enough to warrant evasive maneuvering.

542. Even if the ULTRA intelligence had been provided, it is not at all clear that the Officer of the Deck on *Indianapolis* would have resumed zigzagging at night when conditions of visibility began to improve. Would the week-old ULTRA information have been more convincing than the real-time reports of submarine prosecution along *Indianapolis*'s track transmitted by *Wild Hunter* and the *Harris* hunter-killer group?

543. These records are included with endorsements in the Court of Inquiry and in the IG's supplemental investigation.

544. OXFORD ENGLISH DICTIONARY 2657 (compact ed. 1971). See *Leviticus* 6:16-20.

545. Reproduced in LECH, *supra* note 387, at 268-69. In fact, the committee that studied the McVay case for Senator Lugar concluded that "[t]here was evidence to support the conclusion that the sinking of the *Indianapolis* would have resulted, irrespective of Captain McVay's compliance with the naval regulation regarding 'zigzagging.'" *Lugar Study*, *supra* note 386, at 9.

546. Reproduced in LECH, *supra* note 387, at 254-67.

547. The Navy, however, did not mention the ULTRA matter, which was still highly classified for national security reasons unrelated to Captain McVay. The classification of ULTRA was not within the authority of the Department of the Navy.

court-martialling Captain McVay for his part while others were not punished for theirs. Official records reflect careful consideration of fault on the part of all personnel involved. One effect of the disciplinary decisions finally made was re-emphasis of the strict doctrine of accountability associated with command at sea.

Captain McVay has an important place in naval history, and not as a "scapegoat." He was highly decorated during the war in the Pacific, but he is also a *memento mori* to all commanding officers that they are responsible for vigilance to the limits of human capacity for the safety of their crews. All commanding officers should reflect upon the *Indianapolis* and the hard lesson that Captain McVay teaches—those who labor against the ocean in obedience and trust of authority must know that their captain has neglected no measure to preserve them. That is the traditional bargain of command at sea. Without the responsibility of it, there would be no cause for unquestioning faith in it.⁵⁴⁸

IV. Closing Comments

Advocates for Kimmel, Short and McVay attempt to obtain official remedies on the basis of emotional appeals, frequently disguised in the language of legal grievance. Officials who took administrative or disciplinary action in the three cases did not exceed their lawful authority in any of the matters about which the commanders' advocates have complained. The fundamental nature of Executive power is discretionary decision-making, not adjudication. The President and his appointed deputies had constitu-

548. In the American Navy, the principle of accountability for the safety of one's crew, derives directly from our longstanding tradition of the citizen-soldier. The Founding Fathers explicitly rejected the European tradition of a professional officer caste that put its own stature and survival above that of troops forcibly drawn from the peasantry. Instead, in our democracy the military leader's authority over his troops was linked to a parallel responsibility to them as fellow citizens.

Accountability is a severe standard: The commander is held responsible for everything that occurs under his command. Traditionally, the only escape clause was "an act of God," an incident that no prudent commander could reasonably have foreseen. And "reasonably" was tied to the requirement to be "forehanded"—a sailor's term dictating that even unlikely contingencies must be thought through and prepared for. The penalties of accountable failure can be drastic: command and career cut short, sometimes by court-martial.

Captain Larry Seaquist, USN, *Iron Principle of Accountability Was Lost in Iowa Probe*, NAVY TIMES, Dec. 9, 1991, at 31.

tional or statutory discretion to make each decision that affected the three commanders: to relieve them, to investigate them, to withhold recommendations for advancement, and to refer charges to a court-martial, or, in the case of Kimmel and Short, not to do so. In these cases, the exercise of executive discretion was a manifestation of the fundamental principle of civilian control of the military; that over-arching principle should not be eroded to appease organized demands for exception from it.

When the law provides one party a power over the other, and deprives the party subject to that power of any avenue of redress or appeal, it has already resolved the dispute between them. To be an officer in the military is to submit to such a regime of authority. Generations may argue about "fairness" or "justice," whatever those terms mean to a particular individual at a particular time, but there can be no argument about the legitimacy of the exercise of powers that are left to the conscience of the empowered. The very exercise of such powers is law in action.

The military cases cited in this article are not academic writings. They are the real records of individual plaintiffs and defendants who lost in their struggle to escape the ill consequences of the exercise of authority. The quest for official remedies for Kimmel, Short and McVay is not a quest to correct what was done to them unlawfully, but a quest for exception from the same laws that have claimed so many others. Because these three commanders are infamous is no reason to treat them differently than the thousands of others who have long since been forgotten.

The point of view that redemption may be had only at the hand of government, that the government must officially "reverse" actions taken by the President that were completely and unarguably within his constitutional powers, to reconcile old history with new moods, ascribes a strange spiritual power of absolution to the government that the government does not possess. The government is a creature of law, not the repository of the national spirit. Officials within government are understandably hesitant to discard the road map provided by law and assume the haughty role of oracle and arbiter of the national conscience. It is the job of government officials to execute their duties in accordance with law. "Justice" is administered by reference to law. Sanctions or remedies are imposed or granted as law provides. Errors that may be corrected on appeal are defined with reference to some law that has been violated, some procedure that has not been observed. The notion that government action is somehow the road to redemption in these historical cases, notwithstanding the provisions of law, ascribes an expansive power of conscience to the government

that perhaps reflects the values of a passing generation. However, the fact that no official has thus far felt comfortable to assume such a role, to decide that the President and his subordinates should be retrospectively "corrected" on the basis of subjective factors, is reassuring to those who still believe that government is itself a creature of the Constitution, limited and defined by it.

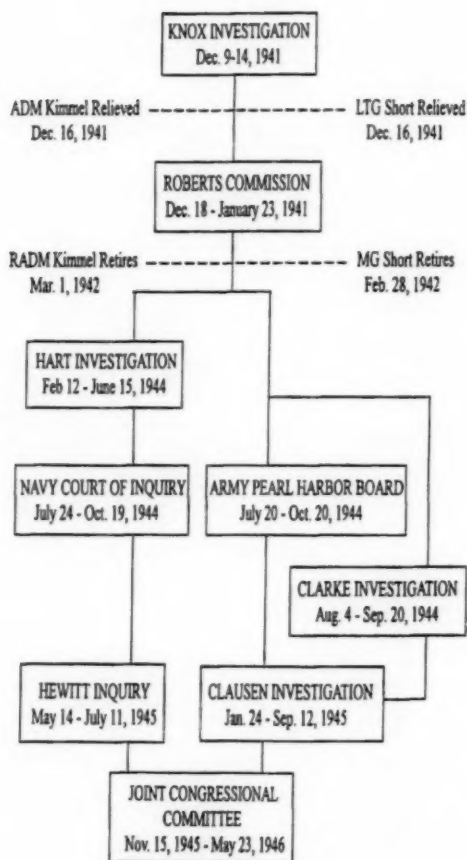


Figure 1
Chronology

PRISONER OF WAR PAROLE: ANCIENT CONCEPT, MODERN UTILITY

MAJOR GARY D. BROWN¹

I. Introduction

Parole has a long and storied history in international law. The word conjures up a variety of thoughts but generally early release from civilian prison. Here, parole is used in the international law sense of releasing a prisoner of war (PW) in return for a pledge not to bear arms.² This article presents a historical analysis of parole and challenges the United States prohibition of service members accepting parole.

Parole is "[t]he agreement of persons who have been taken prisoner by an enemy that they will not again take up arms against those who captured them, either for a limited time or during the continuance of the war."³ The U.S. Department of Defense (DOD) defines parole more broadly, however: "Parole agreements are promises given the captor by a POW to fulfill stated conditions, such as not to bear arms or not to escape, in consideration of special privileges, such as release from captivity or lessened restraint."⁴

The acceptance of parole is said to be a personal matter.⁵ However, parole is not solely a personal pledge but also a reflection on national trustworthiness.⁶ Paroles are "sacred obligations, and the national faith is

1. Chief, International and Operational Law at Headquarters, United States Strategic Command, Offutt Air Force Base, Nebraska. Major Brown received his Bachelor of Science from Central Missouri State University in 1984, a J.D. from the University of Nebraska in 1987, and an LL.M. in 1988 from Cambridge University. Formerly assigned as Deputy Staff Judge Advocate, Howard Air Force Base, Panama, 1993-96; Area Defense Counsel, Royal Air Force Alconbury, England, 1992-93; and Assistant Staff Judge Advocate at both Alconbury (1990-92) and Whiteman Air Force Base, Missouri (1988-90). He is a member of the Nebraska State Bar.

2. Definitions of parole cover a large range of possible promises in return for a release from captivity; for example, a promise not to escape, not to leave a certain geographic area or not to engage in future hostilities against the releasing power.

3. 2 BOUVIER'S LAW DICTIONARY 2459 (1914).

4. U.S. DEP'T OF DEFENSE, DIR. 1300.7, TRAINING AND EDUCATION MEASURES NECESSARY TO SUPPORT THE CODE OF CONDUCT, encl. 2, para. B(3)(a)(5) (23 Dec. 1988) [hereinafter DOD DIR. 1300.7].

pledged for their fulfillment."⁷ Even the U.S. Supreme Court concluded that a country's faith is pledged to fulfill the promise of a paroled PW, and that the national character is dishonored by a parole violator.⁸

II. History

Although it is unclear exactly when parole originated, it developed along the general historical pattern of improving the fortunes of those unlucky enough to become PWs. In the earliest times, there were no prisoners of war; captured enemies were simply killed.⁹ Later, capturing nations began to use PWs as a source of slave labor.¹⁰

During feudal wars in medieval days, at least partly as a result of the spread of Christianity, there began a system that saw some prisoners ransomed.¹¹ The ransom provided a lucrative source of revenue for the detaining authority.¹² Ransom amounts ranged from the reasonable to the very expensive. The difficulty of structuring accurate currency conversions complicates meaningful analysis, but the average ransom equaled the annual pay of the ransomed PW.¹³ In what must therefore have been considered a great bargain, 1700 Samnites captured at Perugia around 300 B.C. were released in return for 310 asses.¹⁴ Ransoming became much

5. U.S. DEP'T OF AIR FORCE, PAM. 110-31, INTERNATIONAL LAW—THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 13-2 (19 Nov. 1976) ("Parolees are bound on their personal honor to fulfill the terms and conditions of their parole.") [hereinafter AFP 110-31].

6. See R.C. HINGORANI, PRISONERS OF WAR 177 (1982) ("[h]aving once accepted the parole, prisoners are under a sacred obligation which should not be violated by the given individual or his State.") (emphasis added).

7. Herbert C. Fooks, Prisoners of War 299 (1924).

8. U.S. *ex rel.* Henderson v. Wright, Case No. 16,777, 28 Fed. Cas. 796, 798 (1863).

9. MICHAEL A. LEWIS, NAPOLEON AND HIS BRITISH CAPTIVES 39 (1962). As late as the Middle Ages, the slaughter of enemy prisoners, and the rape and pillage of cities taken by siege, were not just unlucky occurrences, but were considered a fringe benefit of being a soldier for the victor. HOWARD S. LEVIE, TERRORISM IN WAR: THE LAW OF WAR CRIMES 9-10 (1992).

10. LEWIS, *supra* note 9, at 40; Victor H. Matthews, Legal Aspects of Military Service in Ancient Mesopotamia, 94 MIL. L. REV. 135, 146 (1981); MAURICE H. KEEN, THE LAW OF WAR IN THE LATE MIDDLE AGES 156 (1965).

11. HINGORANI, *supra* note 6, at 179; George B. Davis, *The Prisoner of War*, 7 AM. J. INT'L L. 521, 524 (1913). Suarez, presenting the Catholic position, argued that the victors could slay only those of the defeated who bore some of the guilt for the aggression. FRANCISCO SUAREZ, DE TRIPLICI VIRTUTE THEOLOGICA, FIDE, SPE, ET CHARITATE (1621), *reprinted in* 2 CLASSICS OF INTERNATIONAL LAW 847 (J. Scott ed., 1944).

less common after the end of the Thirty Years' War, but continued until the eighteenth century.¹⁵

Prisoner exchanges were another improvement in the treatment of PWs. They allowed all PWs to go free, as long as the flow of PWs to each belligerent was reasonably balanced. Parole, in one sense, was merely an improved form of exchange which allowed detaining powers to send prisoners home in anticipation of a later exchange that would free them for combat duties again.¹⁶

The Carthaginians were noted for their use of parole.¹⁷ For example, Hamilcar, the great Carthaginian general, released his Numidian captives on the condition that none would again bear arms against Carthage.¹⁸ By the time the Carthaginians paroled Roman General Marcus Atilius Regulus in 250 B.C., parole was already well established in international warfare.¹⁹

Regulus was taken captive during a Roman foray into Africa. Legend has it that the Carthaginians paroled him so that he could return with a Carthaginian embassy to Rome to negotiate a compromise peace. He accepted the parole, promising to return to Carthage if the embassy failed, but when Regulus arrived in Rome he argued in the Senate against any end to the war. Regulus insisted that prisoners like himself who surrendered

12. Matthews, *supra* note 10, at 147. In the Middle Ages, at least, it was also an important source of income for the individual captor, who kept any ransom income. The courts dealt with so many ransom disputes that they laid out strict rules:

The first man to receive the faith of a prisoner . . . was in law his captor, but on two conditions. Firstly . . . he should be the first man to seize the prisoner's right gauntlet, and to put his right hand in his. Thereafter, the gauntlet served as a token of his right. Secondly, he must have made some attempt to fulfill his contract to his prisoner, to protect his life. If he simply abandoned him on the field, he lost his right to him.

KEEN, *supra* note 10, at 165-66.

13. Davis, *supra* note 11, at 540. The ancient Greeks set the price of ransom at a pound of gold. ALBERICO GENTILI, *DE JURE BELLI LIBRI TRES* (1612), reprinted in 2 CLASSICS OF INTERNATIONAL LAW 206 (J. Scott ed., 1933).

14. Davis, *supra* note 11, at 540.

15. HINGORANI, *supra* note 6, at 179; Davis, *supra* note 11, at 540.

16. LEWIS, *supra* note 9, at 44; KEEN, *supra* note 10, at 169.

17. The Carthaginian civilization flourished from about 500 B.C. to about 200 B.C.

18. FOOKS, *supra* note 7, at 297. Hamilcar Barca (d. 228 B.C.) stood for a time against the might of Rome, and was the father of Hannibal, the hero of Cannae.

19. HOWARD S. LEVIE, 59 PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT, NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES 398 n.17 (1977).

rather than dying in battle were not worth saving. Ignoring the advice of his family and friends, Regulus then returned to Carthage as he had promised where he was tortured to death by the angry Carthaginians.²⁰

Medieval knights were also bound by rules of parole. "A knight who escapes although he had given his word to remain in captivity offends God and man."²¹ This was true as long as his captors treated him humanely; escape from a captor who killed or caused the death of prisoners by poor treatment was permissible.²² Through the ensuing years, belligerents continued to employ parole but it was sometimes supplanted by the more lucrative option of ransom; however, parole was always available if the belligerents agreed.

During the American Revolution, officers on both sides generally expected and received paroles.²³ One British commander even paroled American enlisted troops.²⁴ The terms and application of the paroles were not always the same, however. American officers who were paroled by the British were committed to three essential pledges. They agreed to abstain from military activity, to refrain from correspondence with the enemy or criticism of the British and to present themselves if summoned. The last pledge was always included, but the British considered the other two binding customary law.²⁵ It was also not unknown for the British to parole officers, but then retain them in close confinement.²⁶ This is less generous than the traditional parole, but certainly preferable to actual imprisonment.

Congress took a more fixed approach to the parole issue. In February of 1776, it set out a specific formula for the granting of parole to enemy officers.²⁷ The American parole required that British officers go to and stay within six miles of a place of their choosing, that they refrain from

20. PIERINO BELLI, *DE RE MILITARI ET BELLO TRACTATUS* (1563), reprinted in 2 CLASSICS OF INTERNATIONAL LAW 126 (J. Scott ed., 1936); ISAAC ASIMOV, *THE ROMAN REPUBLIC* 80 (1966).

21. THEODOR MERON, *HENRY'S WARS AND SHAKESPEARE'S LAWS* 167 (1993).

22. *Id.* If a knight violated his parole, his captor could either bring suit in a court of chivalry or formally dishonor the defaulter's arms. The captor would do this by suspending them publicly from a horse's tail or hanging them upside down at a tournament or court. Until the reproach was removed, the disgraced knight was banned from participation in any knightly endeavor. *THE LAWS OF WAR* 37 (Michael Howard ed., 1994).

23. George L. Coil, *War Crimes of the American Revolution*, 82 MIL. L. REV. 171, 187 (1978); DANSKE DANDRIDGE, *AMERICAN PRISONERS OF THE REVOLUTION* (1967).

24. Coil, *supra* note 23, at 186.

25. CHARLES H. METZGER, *THE PRISONER IN THE AMERICAN REVOLUTION* 193 (1971).

26. DANDRIDGE, *supra* note 23, at 51.

passing intelligence to the British and that they not criticize the actions of Congress. Although in at least one case Congress ordered that a guard be assigned to an officer they deemed less than trustworthy, it is fair to say that the Americans were generally more liberal in the area of parole than the British.²⁸

American liberality was stretched beyond the limit when Congress discovered that British General John Burgoyne, who was free in England on parole, was participating in sessions of the House of Lords. Congress considered this an affront, and ordered that all British and German officers who were absent from America on parole were to return. The harsh effect of this edict was reduced when many of the parolees, including Lieutenant General Burgoyne, were exchanged.²⁹

Although many parole pledges were broken, the parole system continued to operate throughout the war.³⁰ Taking into particular consideration the horrible conditions aboard the British prison ships, the system must be termed a success in that it avoided much unnecessary suffering by PWs.³¹

During the Napoleonic Wars, Napoleon's situational ethics placed great strain on the parole regime that was in effect.³² French abuses of the system were particularly egregious.³³ Nonetheless, France and Britain retained a parole system throughout the conflicts. In stark contrast to the

27. The congressionally mandated oath was as follows:

I _____ being made a prisoner of war, by the army of the Thirteen United Colonies in North America, do promise and engage, on my word and honor, and on the faith of a gentleman, to depart from hence immediately to _____, in the province of _____, being the place of my election; and there, or within six miles thereof, to remain during the present war between Great Britain and the said United Colonies, or until the Congress of the said United Colonies shall order otherwise; and that I will not directly or indirectly, give any intelligence whatsoever to the enemies of the United Colonies, and do or say anything in opposition to, or in prejudice of, the measures and proceedings of any Congress for the said Colonies, during the present trouble, or until I am duly exchanged or discharged.

Id. at 192.

28. *Id.* at 193.

29. *Id.* at 197.

30. *Id.* at 192, 195.

31. See generally, DANDRIDGE, *supra* note 23.

32. "Treaties are observed as long as they are in harmony with interests." Napoleon, quoted in A DICTIONARY OF MILITARY QUOTATIONS 46 (T. Royle ed., 1990).

French attitude, British officers viewed the parole pledge as a serious matter, and even considered accepting parole a military duty as it enabled them to return to work and resume earning their pay.³⁴

Both sides recognized and used parole in the War of 1812.³⁵ Neither side in the conflict had an interest in holding large numbers of prisoners, but limiting the number was generally accomplished through prisoner exchanges.³⁶ Many privateers at sea simply released prisoners, even without a parole agreement, as the prisoners took up valuable space on their ships and consumed the limited stocks of food and water.³⁷

Parole was generally employed for officers, but some difficulties were encountered. The British wanted to limit the parole of naval officers to those captured from larger ships; this was to avoid granting parole to bothersome privateers.³⁸ Generally, however, parole for officers was the rule.³⁹

Later in the nineteenth century, the Dix-Hill Cartel, negotiated between the two sides in the United States Civil War, employed paroles in the larger context of a prisoner exchange system. The Confederacy was

33. This was perhaps a consequence of the French Revolution. The revolution was at its heart class warfare, and it resulted in a mix of classes and education levels in the French officer ranks. This, the theory goes, removed the "gentlemen" from the "officers and gentlemen" equation, and eroded the strong sense of honor that ordinarily bound officers to keep their word. It is also noteworthy that Napoleon made no attempt to enforce paroles granted Frenchmen. LEWIS, *supra* note 9, at 45, 63. Although he did nothing to prevent his officers from breaking their paroles, Napoleon apparently recognized the importance of the "gentlemen" issue. He restored the rank distinctions in parole that had been abolished by the revolutionary government of France at the end of the 18th Century. Burrus M. Carnahan, *Reason, Retaliation, and Rhetoric: Jefferson and the Quest for Humanity in War*, 139 MIL. L. REV. 83, n.38 (1993).

34. LEWIS, *supra* note 9, at 64.

35. JONATHAN FRANKLIN WILLIAM VANCE, OBJECTS OF CONCERN 9 (1994); LEVIE, *supra* note 19, at 399.

36. See Anthony George Dietz, *The Prisoner of War in the United States During the War of 1812* (1964) (unpublished Ph.D. dissertation, The American University) (available at the Air Force Academy Library). Some enlisted prisoners were paroled while awaiting exchange, but this practice became less common as the war wore on. *Id.* at 242. Exchange values were generally the same as those negotiated under the Dix-Hill Cartel. See *infra* notes 40-45 and accompanying text.

37. Dietz, *supra* note 36, at 350.

38. *Id.* at 33.

39. The United States original intent was to offer parole only to field grade officers, but through a misunderstanding and a subsequent re-examination of the issue, all officers were offered parole. *Id.* at 287.

particularly interested in avoiding the burden of feeding PWs, and pressed for a formal exchange agreement.⁴⁰ Unwilling to recognize the Confederacy but wanting to improve conditions for Union soldiers held captive, the Lincoln Administration finally negotiated an exchange system with the Confederate Army. The Dix-Hill Cartel was formally established in July 1862.⁴¹

Dix-Hill called for each side to exchange or parole all prisoners of war "in ten days from the time of their capture, if it be practicable to transfer them to their own lines in that time; if not, as soon thereafter as practicable."⁴² Paroled PWs could not serve in the armed forces again until they were formally exchanged; in other words until a PW belonging to the detaining power was also released, and both PWs could again actively engage in the hostilities.⁴³ Paroled prisoners were held in camps located in friendly territory until they were exchanged.⁴⁴ Of course, the relative station of the prisoners was taken into account. Dix-Hill specified that a noncommissioned officer would be exchanged for two privates, a lieutenant for four and the exchange values worked their way up to a commanding general, who was worth sixty privates in exchange.⁴⁵

The cartel lasted for ten months, but eventually failed. There were several reasons for this, centering around politics and failures to adhere to the terms of the cartel. Neither side was particularly faithful in exchanging the prisoners "as soon as practicable." The speed of the exchange tended to vary with the flow of the war; the side getting the best of the war at the time was reluctant to give up large numbers of prisoners. Further, both bel-

40. JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM* 791 (1988).

41. *Id.*

42. WAR OF THE REBELLION: OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, SERIES II VOL. IV, *Prisoners of War, etc.* 267 (1899) [hereinafter OFFICIAL RECORDS].

43. LEVIE, *supra* note 19, at 399. Dix-Hill also answered in advance some of the thorny questions that can arise regarding military service by parolees. "[P]arole forbids the performance of field, garrison, police, or guard, or constabulary duty." OFFICIAL RECORDS, *supra* note 42, at 267.

44. JAMES GARFIELD RANDALL & DAVID HERBERT DONALD, *THE CIVIL WAR AND RECONSTRUCTION* 334 (1969).

45. MCPHERSON, *supra* note 40, at 791. During the American Revolution, the British and Continental armies also negotiated a value in privates for soldiers of each rank. A 1780 tariff, as such agreements were called, seems to have been the most definitive. It valued a sergeant at two privates, a major at 28 and a lieutenant general, the highest ranking military officer at the time, at 1044. METZGER, *supra* note 25, at 222; GEORGE G. LEWIS & JOHN MEWHA, *HISTORY OF PRISONER OF WAR UTILIZATION BY THE UNITED STATES ARMY 1776-1945*, at 6 (1955). It is unclear whether, between the wars, privates got better or generals got worse!

ligerents were at times angry over the treatment of their PWs.⁴⁶ The last straw from the North's perspective was when some of the 37,000 Confederate soldiers who were granted paroles by Union generals after the battles at Vicksburg and Port Hudson were found to have returned to combat.⁴⁷ Afterward, there was little Union support for the parole arrangement.

In the political arena, the South was angry over the execution of a Southern citizen who tore down a United States flag in occupied Louisiana. In response, Confederate President Davis ordered that the responsible general immediately be hung if captured.⁴⁸ On the other hand, the Confederacy's refusal to grant PW status to Black PWs and their officers angered the North.⁴⁹ All these factors combined to spell the end of the formal exchange-parole cartel, but informal arrangements did continue until the end of the war.⁵⁰

Boer guerrillas regularly paroled British PWs in the Boer War, which lasted from 1899 to 1902.⁵¹ Upon release, PWs were frequently required to take an oath, promising to keep any information secret from their commanders upon their return. They were also required to take the traditional parolee's oath: not to take up arms again against their captors.⁵² Apparently, British soldiers did not take their parole oaths seriously, and the paroles were regularly broken.⁵³

The British offered a form of parole to ordinary citizens in the Orange Free State, promising that those who would agree to refrain from participating in the war against Britain would be allowed to return to their homes without loss of property or privilege.⁵⁴ In the end this was not considered a true parole by either side, however, as those offering the pledge were not considered prisoners of war at the time.⁵⁵

The Boer War was unique for its time in that the Boers acted as guerrillas during part of the conflict. During this time they were unable to

46. LEWIS & MEWHA, *supra* note 45, at 30.

47. McPHERSON, *supra* note 40, at 792.

48. RANDALL & DONALD, *supra* note 44, at 335.

49. *Id.*; McPHERSON, *supra* note 40, at 792.

50. RANDALL & DONALD, *supra* note 44, at 335.

51. VANCE, *supra* note 35, at 18.

52. *Id.* at 18 n.29.

53. *Id.*

54. PERCY BORDWELL, *THE LAW OF WAR BETWEEN BELLIGERENTS* 146 (1908).

55. *Id.* at 147.

detain PWs, but they did strip them of badly needed arms, equipment and sometimes even clothing.⁵⁶ Circumstances were different during the first World War where both sides had the resources to hold PWs.

World War I saw very limited use of parole. The French released German officers on parole in France.⁵⁷ The Germans were allowed to circulate freely, without surveillance, near their place of internment.⁵⁸ Although there is no formal requirement of reciprocity in the area of parole, the French discontinued the paroles when Germany failed to extend the same privilege to captured French officers.⁵⁹

III. Parole in International Law

Parole has been a common practice for hundreds of years,⁶⁰ and it is fully supported in the international community. Scholars reason that parole is morally and logically consistent with international law. Hugo Grotius supported the concept of parole in war on practical grounds:

[I]t is not contrary to duty to obtain liberty for oneself by promising what is already in the hands of the enemy. The cause of one's country is, in fact, none the worse thereby, since he who has been captured must be considered as having already perished, unless he is set free.⁶¹

Other international legal scholars have been just as accepting of the concept of parole. Vattel asserted that parole of prisoners of war was a given.⁶² Pufendorf endorsed a broader view of parole. He echoed Grotius' sentiments, but thought that the parole pledge extended only to offensive actions against the captor.⁶³

Ayala's view of parole differed somewhat from that of other international lawyers. He asserted that parole was proper, and that breaking the

56. VANCE, *supra* note 35, at 18.

57. HINGORANI, *supra* note 6, at 187 n.23.

58. FOOKS, *supra* note 7, at 301.

59. *Id.*

60. See *supra* notes 9-59 and accompanying text.

61. HUGO GROTIUS, *DE JURE BELLI AC PACIS* (1625), reprinted in 2 CLASSICS OF INTERNATIONAL LAW 853-54 (J. Scott ed., 1925).

62. E. DE VATTTEL, *LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉ À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS* (1758), reprinted in 3 CLASSICS OF INTERNATIONAL LAW 284 (J. Scott ed., 1916).

parole oath was a violation of a sacred trust.⁶⁴ Ayala also proposed that a released prisoner was not obligated to keep his word if the captor was not a "just and lawful enemy."⁶⁵

Lieber's Code, which articulated the rules of warfare for Union troops in the Civil War, extensively addressed parole.⁶⁶ Articles 119-134 of the code permitted parole and set out the rules to follow when granting or receiving it. Under Lieber's Code, PWs could only accept parole through one of their commissioned officers, the most senior one available.⁶⁷ As parole was an individual act, both offering and accepting it were totally voluntary. There was no obligation on the part of the detaining power to offer parole to certain individuals, or to anyone.⁶⁸ By the same token, any PW could refuse to accept parole.⁶⁹ Parole also required the approval of the PW's country.⁷⁰

The Code specified that the parole promise not to serve again referred only to active service in the same war against the detaining power or its allies.⁷¹ An individual who broke his parole and was then recaptured could be punished with death.⁷² Lieber's concepts in the area of parole were

63. See SAMUEL PUFENDORF, *DE JURE NATURAE ET GENTIUM LIBRI OCTO* (1688), reprinted in 2 *CLASSICS OF INTERNATIONAL LAW* 1150 (J. Scott ed., 1934):

[S]ince it is absurd for me to be a citizen and yet be under an obligation which also renders me of no service to the state in its extreme necessity, no less absurd is it for me to be able to be obligated by a simple pact so that I may not resist the unjust force of one who is intent upon the destruction of me and mine; and that for this reason such a pact of a prisoner is to be understood as only for an offensive, not a defensive war, especially if my safety will also be imperiled together with that of the state.

64. BALTHAZAR AYALA, *DE JURE ET OFFICIIS BELLICIS ET DISCIPLINA MILITARI LIBRI* (1582) reprinted in 2 *CLASSICS OF INTERNATIONAL LAW* 58 (J. Scott ed., 1912).

65. *Id.* at 59. This proposition was not echoed by others in his field, and is not recommended here. Although a sound thought, it places each parolee in the position of judging whether his captor has behaved honorably, and creates more difficulties than it solves.

66. U.S. Army General Order No. 100 (24 Apr. 1863), reprinted in R.S. HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR 45-71* (1983) [hereinafter Lieber's Code].

67. *Id.* art. 127.

68. *Id.* art. 133.

69. *Id.*

70. *Id.* art. 132.

71. *Id.* art. 130. The term "active service" is ambiguous, but was clarified in the Dix-Hill Cartel. See *supra* note 43.

72. Lieber's Code, *supra* note 66, art. 124. But see Carnahan, *supra* note 33, at 116 (Thomas Jefferson argued, without citing any precedent, that "the law of nations authorized only close confinement, not death, for a violation of parole.").

incorporated, though with less detail, in the Declaration of Brussels of 1874, and later in the Hague Convention as follows:⁷³

Prisoners of war may be set at liberty on parole if the laws of their country allow, and, in such cases, they are bound, on their personal honor, scrupulously to fulfill, both towards their own Government and the Government by whom they were made prisoners, the engagements they have contracted.⁷⁴

Later parole made its way into the Geneva Convention Relative to the Treatment of Prisoners of War. "Prisoners of war may be partially or wholly released on parole or promise, in so far as is allowed by the laws of the Power on which they depend."⁷⁵

At first glance it seems ridiculous to expect a nation at war to release PWs with little to keep them from returning to the battlefield but their honor. Yet the system obviously worked to some extent or it never would have endured. The next question to answer, therefore, is why it worked.

IV. Parole's Effectiveness: Honor and Fear

Generally, parole was offered only to officers, those "gentle" members of the educated and upper class.⁷⁶ To gentlemen, honor meant a great deal, and parole was a matter of honor. Francis Lieber codified the custom. "Commissioned officers only are allowed to give their parole, and they can

73. Lieber's inclusion of parole in his code was merely a recognition that PW parole was a valid option for nations at war. PW parole was so widely recognized, there being nothing to recommend against it, that its inclusion in the later conventions was accompanied by no discussion at the conferences. Although parole was not mentioned in the 1929 Geneva PW convention, it was still applicable through the Hague rules or customary international law through that period. LEVIE, *supra* note 19, at 399.

74. ANNEX TO HAGUE CONVENTION IV RESPECTING THE LAWS AND CUSTOMS OF WAR ON LAND, art. 10 (1907), reprinted in DOCUMENTS ON THE LAWS OF WAR 48 (A. Roberts & R. Guelff ed., 1982) [hereinafter HAGUE CONVENTION IV].

75. GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR, art. 21 (1949), reprinted in DOCUMENTS ON THE LAWS OF WAR 216 (A. Roberts & R. Guelff ed., 1982) [hereinafter GENEVA CONVENTION III].

76. FOOKS, *supra* note 7, at 298.

give it only with the permission of their superior, as long as a superior rank is within reach."⁷⁷

If honor and fear of recapture by the enemy were not enough to hold a gentleman to his promise, society also helped stiffen his resolve. A parole breaker could face severe sanctions from his own country. During the Napoleonic Wars, British officers who broke parole were subject to being stripped of their commission and sent to prison, or even back to France. Escaped prisoners were required to report to a military board and answer, among other questions, the all-important query of whether they were on parole at the moment of escape.⁷⁸ This board, called the Board of Transportation, was in charge of all British prisoner of war affairs.⁷⁹ To avoid being expelled from their unit or service, disowned by their friends or being sent back to France, escapees must not have been on parole at the time of escape.⁸⁰

It may seem unusual that Britain was so hard on its own military members who violated parole, but the British seem to have believed that an officer who would not keep his word to the enemy was of little value to the sovereign. There is also the issue of maintaining military discipline:

It is, therefore, the height of impiety to swear falsely and, considered closely, such conduct is unprofitable and hurtful in the extreme to a general or leader of an army, for the sacredness of the oath is the bond of military discipline and if the general sets the example of lightly esteeming it as regards both enemy and his own men, everything must fall into muddle and confusion, for he will not be able to rely on the word of his enemy or on the fidelity of his own men.⁸¹

Although a strict code of honor and possible sanctions by the PW's own country can decrease the number of parole breakers, there is always the possibility that some parolees will break their pledge. In that event, a

77. Lieber's Code, *supra* note 66, art. 126.

78. A. J. BARKER, PRISONERS OF WAR 10 (1975).

79. *Id.*

80. LEWIS, *supra* note 9, at 46.

81. AYALA, *supra* note 64, at 57.

detaining power who recaptures a former PW who has broken parole has extensive options in dealing with the miscreant.

Arguably, the death penalty is one possible punishment for those breaking parole.⁸² Opinion is divided on this issue, however. Thomas Jefferson asserted that international law permitted only close confinement in the case of a recaptured parolee.⁸³ He did, however, threaten retaliation if the British carried out the penalty of death against parole violators in the Revolutionary War.⁸⁴

More recently, the Hague Convention specified that parole breakers would forfeit their right to be treated as prisoners of war if recaptured.⁸⁵ The 1949 Geneva Convention is less direct on the issue. A recaptured parole violator under the Convention would be afforded the opportunity to defend himself against charges of parole breaking. In the interim, the accused violator would be entitled to PW status.⁸⁶

If parole were permitted by the United States, the punishment for convicted parole violators would have to be set, as the Uniform Code of Military Justice does not address the issue.⁸⁷ That the United States does not

82. See, e.g., Fooks, *supra* note 7, at 300; Lieber's Code, *supra* note 66, art. 130. In the early part of the twentieth century customary international law permitted the death penalty for those who violated parole. L. OPPENHEIM, 2 INTERNATIONAL LAW 170 (1912).

83. Carnahan, *supra* note 33, at 116.

84. Jefferson's position may have been at least partly the result of a bizarre scheme the British had of requiring paroles of all able bodied Virginia men aged 16-50 in lieu of becoming PWs. The British justification was that all men in that category were by Virginia law in the militia, despite the fact that many had never been trained or served on active duty. *Id.* at 115.

85. HAGUE CONVENTION IV, *supra* note 74, Article 12.

86. III INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 181 (Pictet ed., 1960) [GENEVA CONVENTION COMMENTARY].

87. Parole is not an enumerated offense in the UCMJ. In the 1969 revised edition of the *Manual for Courts-Martial* it was referred to as an Article 134 offense, but the reference there was not to prisoner of war parole. MANUAL FOR COURTS-MARTIAL, UNITED STATES, at 25-16, A6-25 (1969). Article 134, known as the General Article, covers those offenses not specifically addressed in the Uniform Code of Military Justice. UCMJ art. 134 (1983). The closest offense currently in the UCMJ is article 105, Misconduct as a Prisoner. That provision provides for punishment for PWs who violate law or custom to obtain favorable treatment for themselves, but only if the violation also causes other PWs to be more harshly treated, such as by physical punishment or closer confinement. UCMJ art. 105 (1994). A military member convicted under that article could receive any punishment other than death, up to and including life imprisonment.

have a fixed punishment is not unusual. "It is difficult to conceive that any State has laws punishing members of its own armed forces for the violation of a parole given as a prisoner of war."⁸⁸ Nonetheless, it would be better to have a fixed policy.

Although parole violations could be treated as war crimes, it would be more realistic to treat them as violations of the General Article, subject to a maximum punishment of six months in confinement.⁸⁹ If punished as war criminals, parole violators could be subject to severe punishment.⁹⁰ Consequently, the military would look for excuses to avoid prosecution rather than subject its own members to severe sentences. Placing the maximum sentence at a reasonable level would make it more likely that the

88. LEVIE, *supra* note 19, at 402. Thus, the traditional British attitude toward parole violations (*see supra* note 81 and accompanying text) is the exception rather than the rule. This statement also ignores the adverse effect parole violations have on military discipline.

89. Professor Levie believes that the United States Army, at least, already has decided that an analogy to a UCMJ parole violation would be the most appropriate approach to any violations of PW parole. LEVIE, *supra* note 19, at 402 n.43.

90. The death penalty is unlikely as "[t]he punishment imposed for a violation of the law of war must be proportionate to the gravity of the offense." U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 508 (18 July 1956) (C1, 15 July 1976) [hereinafter FM 27-10]. Parole is not a grave breach, so the death penalty is not an available punishment. Further, as cited above, an accused would be entitled to protection as a PW; this includes procedures for imposing the death penalty. Geneva Convention III requires the notification "of the offenses which are punishable by the death sentence under the laws of the Detaining Power." GENEVA CONVENTION III, *supra* note 75, art. 100. This provision further protects PWs from capital punishment.

United States would fulfill its obligation to take action against parole violators.⁹¹

V. Parole Policy of the United States

The United States has, at times in its history, granted parole to enemy prisoners of war (EPWs) and allowed, either explicitly or implicitly, its own troops to accept parole.

General Winfield Scott paroled EPWs during the Mexican-American War.⁹² As discussed earlier, prisoners on both sides were paroled in the Revolutionary War, the War of 1812 and the American Civil War.⁹³

After Italy's capitulation in 1943 it declared war on Germany and was granted co-belligerent status with the Allies. Some captured Italian troops were granted limited parole and were allowed to work for the Allies.⁹⁴ Also during World War II, the Japanese "paroled" certain members of the U.S. armed forces in the Philippines, as they did with some other Allied prisoners throughout the theater.⁹⁵ Japanese actions tended not to be true paroles, however, as they provided no benefit in return for the prisoner's promise.⁹⁶

Current U.S. policy prohibits prisoners of war from accepting parole.⁹⁷ The Code of Conduct for the Armed Forces states: "I will accept

91. Such a policy would mean that any enemy parole violators who came into United States custody would be treated the same. It does not provide protection for American service members who might violate parole and then fall again into enemy hands.

92. George S. Prugh Jr., *The Code of Conduct for the Armed Forces*, 56 COL. L. REV. 678, 691 n.54 (1956). Paroled Mexican officers so commonly violated their oaths that General Scott publicly threatened them with hanging. Several Mexican officers were tried and sentenced to death for violating their parole. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 795 (1920).

93. See *supra* notes 23-50 and accompanying text.

94. LEWIS & MEWHA, *supra* note 45, at 93-95; LEVIE, *supra* note 19, at 400.

95. Prugh, *supra* note 92, at 683; LEVIE, *supra* note 19, at 399.

96. BARKER, *supra* note 78, at 118. Thousands of Allied prisoners captured after Japanese victories at both Hong Kong and Singapore were forced to sign pledges not to escape. These "paroles" merely enabled PWs to avoid beatings in return for their signature. *Id.* The Judge Advocate General of the U.S. Army did, however, find paroles given by U.S. service members after the surrender of the Philippines to be valid, as long as they were uncoerced. 5 J.A.G. Bull. 325 (1946).

97. The Departments of the Army and Air Force authorize parole exceptions that are not provided for in national policy as reflected in Department of Defense publications. See *infra* notes 101-105 and accompanying text.

neither parole nor special favors from the enemy."⁹⁸ Acceptance of parole, which is broadly defined,⁹⁹ is also circumscribed by DOD guidance. "The United States does not authorize any Military Service member to sign or enter into any such parole agreement."¹⁰⁰

However, not all U.S. military publications are so clear. *Air Force Pamphlet 110-31* asserts that the general rule contained in the Code of Conduct prohibiting U.S. personnel from accepting parole may be subject to relaxation by national authorities in particular conflicts, and cites examples of when it has been relaxed.¹⁰¹ It appears to have been relaxed during the Vietnam conflict, when, in response to the unacceptable treatment of American PWs by the North Vietnamese, the Department of Defense issued a letter on 3 July 1970 that included the language, "The U.S. approves any honorable release and prefers sick and wounded and long term prisoners first."¹⁰²

Under the Air Force policy, limited parole in the form of a promise not to escape is also permitted for specific, limited purposes if authorized by the senior ranking officer exercising command authority.¹⁰³ Subject to one exception, Army members are prohibited by *U.S. Army Field Manual 27-10* from accepting parole.¹⁰⁴ The exception echoes the position of *Air Force Pamphlet 110-31*. An Army member,

may be authorized to give his parole to the enemy that he will not attempt to escape, if such parole is authorized for the specific purpose of permitting him to perform certain acts materially contributing to the welfare of himself or of his fellow prisoners . . . when specifically authorized to do so by the senior officer or noncommissioned officer exercising command authority.¹⁰⁵

98. Code of Conduct for Members of the Armed Forces of the United States, Exec. Order No. 10,631, 20 Fed. Reg. 6,057 (1955), as amended by Exec. Order No. 12,017, 42 Fed. Reg. 57941 (1977); and Exec. Order No. 12,633, 53 Fed. Reg. 10,355 (1988) [hereinafter Code of Conduct].

99. DOD Dir. 1300.7, *supra* note 4, at encl. 2, para. B3a(5).

100. *Id.*

101. AFP 110-31, *supra* note 5, at 13-2.

102. *Id.* at 13-7 n.12 (emphasis added). One can debate the meaning of "honorable," but it is certainly arguable that a release in return for a promise not to fight again would be honorable. In any event, the letter certainly failed to reflect the apparently intractable position of article 3 of the Code of Conduct.

103. *Id.* This would include a PW's visit to a medical facility for treatment, or a temporary parole of a chaplain to perform his normal duties.

104. FM 27-10, *supra* note 90, para. 187.

Examples of the "certain acts" given in the manual are seeking medical treatment or carrying out duties as a medical officer or chaplain.¹⁰⁶

Both the Air Force and the Army rules leave room to maneuver in the area of parole.¹⁰⁷ Both are significantly more flexible than the Department of Defense guidance, which clearly specifies that U.S. PWs will never accept parole.¹⁰⁸ The changing nature of warfare, however, might suggest a more flexible approach to this issue. Perhaps the proscription against parole should be reexamined.

VI. The Case for Parole

Although international conflict is broadly defined, non-international disputes have become the more frequent occurrence. "Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2."¹⁰⁹ This definition still leaves out the more frequent occurrences in which elements of a nation, or former nation, become involved in hostilities and forces of another nation (e.g., the U.S.) are deployed in support of one side. Even in non-international conflicts, however, U.S. and U.N. policies dictate the application of Geneva Convention principles.¹¹⁰ As much of the law contained in the conventions has become customary, one can only hope that other nations will also apply the principles. However recent events have shown that

105. *Id.*

106. *Id.*

107. The Department of the Navy provides for instruction in the Code of Conduct, but does not supplement the Department of Defense guidance, as do the Departments of the Air Force and Army. U.S. DEP'T OF NAVY, SECRETARY OF THE NAVY INSTR. 1000.9 (4 Oct. 1979). The Air Force is the executive agent for Code of Conduct training. DOD DIR. 1300.7, *supra* note 4, para. D3.

108. Clearly, each branch of the U.S. military should have the same policy toward parole. These distinctions have arisen because of the attempts of the services to inject logic into an illogical system that prohibits parole.

109. I INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY TO THE GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 32 (Pictet ed., 1952).

110. See U.S. DEP'T OF DEFENSE, DIR. 5100.77, DOD LAW OF WAR PROGRAM (10 July 1979); Umesh Palwankar, *Applicability of International Humanitarian Law to United Nations Peacekeeping Forces*, INT'L REV. RED CROSS 232 (May-June 1993).

international norms are frequently disregarded because of the changing nature of warfare.

Most of the conflicts in which the United States now involves itself are operations other than war.¹¹¹ The enemy is frequently under-equipped, and often uses guerrilla tactics. This means there are not likely to be fixed camps for combatants; there certainly will be none for PWs.

Recent conflicts have also involved enemies who are likely to disregard the Geneva Conventions and other rules of armed conflict, perhaps arguing that the Geneva Conventions do not apply in conflicts of a non-international nature. This cavalier attitude toward international norms can create a hazardous situation for U.S. PWs, as was evidenced during the conflicts in Korea and Vietnam.¹¹²

More recently, in Desert Storm, the Iraqis violated international norms. For instance, an Iraqi soldier digitally raped one female PW, and both female PWs held by Iraq in the Persian Gulf Conflict were subjected to sexual threats.¹¹³ Surely the United States would not punish a female combatant who was concerned for her well-being for accepting parole. Parole acceptance could even be encouraged as a relatively proactive method of avoiding sexual assault. Of course, parole should remain an option equally available to male and female PWs.

A further rationale for reinstituting a parole regime is that all repatriated PWs are prohibited from again engaging in active military service

111. "It is expected that Armed Forces of the United States will increasingly participate in [military operations other than war]." THE JOINT CHIEFS OF STAFF, JOINT PUB. 3-07, JOINT DOCTRINE FOR MILITARY OPERATIONS OTHER THAN WAR, I-7 (16 June 1995) [hereinafter JOINT PUB. 3-07]. Examples of military operations other than war include combating terrorism, counterdrug operations, humanitarian assistance, peace operations and support to insurgencies. *Id.* at III-1.

112. During the Korean Conflict, U.S. PWs were tortured, beaten, starved and subjected to Communist indoctrination. Over a third of them died in captivity. William P. Lyons, *Prisoners of War and the Code of Conduct*, NAVAL WAR COLLEGE REV., Dec. 1967, at 60, 85; T.R. FEHRENBACH, *THIS KIND OF WAR* 464, 541 (1963). American PWs were also subject to torture and privation in Vietnam. JIM & SYBIL STOCKDALE, *IN LOVE AND WAR: THE STORY OF A FAMILY'S ORDEAL AND SACRIFICE DURING THE VIETNAM YEARS* 296 (1984); ROBINSON RISNER, *THE PASSING OF THE NIGHT* (1973).

113. Rowan Scarborough, *Female POWs Abused; Pentagon Accused of Hiding Incidents*, WASH. TIMES, June 12, 1992, at A1; *U.S. Says All POWs in Iraq Were Abused*, ORLANDO SENTINEL TRIB., Aug. 2, 1991, at A11; RHONDA CORNUM, *SHE WENT TO WAR* 49 (1992).

under Geneva Convention III, regardless of how the repatriation occurred.¹¹⁴ Prisoners of war who agree not to fight again in return for their release are merely promising to fulfill a preexisting treaty obligation.

Parolees can serve in other capacities for their militaries; they just cannot again engage in combat against their captors or their captors' allies. "The usual pledge given in the parole is not to serve during the existing war unless exchanged. This pledge refers only to active service in the field against the paroling belligerent or his allies actively engaged in the same war."¹¹⁵ Article 117 of the Geneva Convention III "forbids any repatriated person to serve in units which form part of the armed forces but does not prevent their enrollment in unarmed military units engaged solely in auxiliary, complementary or similar work."¹¹⁶ In addition, returning PWs are potentially a good intelligence source, and would be in a position to provide excellent training to friendly combatants.

For these reasons, an amendment to the Code of Conduct is in order. The last sentence of Part 3 of the Code of Conduct should be replaced by a sentence reading: "If offered, and approved by my senior officer in command, I may accept a simple parole, the terms of which may only be a pledge not to engage in combat against my captors or their allies again in return for my release to friendly forces."¹¹⁷

The parole should not be confined to the officer ranks, but should be available to enlisted PWs, as well. The historical rationale of confining parole to officers, that only officers can be trusted to comply with their word, has outlived its usefulness.¹¹⁸ The traditional requirement that the senior ranking officer approve the parole is still a useful check on a parole system, however.

In addition to preventing needless suffering by U.S. PWs, there are other advantages to permitting them to return from captivity on parole. Adopting a parole policy would end the U.S. military's duplicitous practice of ignoring violations of the Code of Conduct. According to Admiral

114. GENEVA CONVENTION III, *supra* note 75, art. 117.

115. Lieber's Code, *supra* note 66, art. 130.

116. GENEVA CONVENTION COMMENTARY, *supra* note 86, at 539.

117. It is important to remember that permitting U.S. forces to accept parole would impose no reciprocal obligation on the United States to grant parole to EPWs. Because the United States has the resources and the will to treat EPWs properly, a policy of granting parole to EPWs may offer little advantage to the United States.

118. BORDWELL, *supra* note 54, at 243-44.

Stockdale, "For a military man to accept parole and come home early was forbidden by the Code of Conduct. Yet our government encouraged and condoned this sort of release."¹¹⁹ Rather than punishing those who accepted early release from the North Vietnamese, the DOD allowed PWs to follow their consciences.¹²⁰ Despite issuing guidance to the contrary, the United States has demonstrated through its deeds that it will not make its PWs suffer just to fulfill the Code of Conduct. Unfortunately, espousing policy on the one hand and violating it on the other leaves the question open, to no benefit. An unclear signal in any area of the Code of Conduct creates enormous problems for PWs, who rely on the Code as a major source of discipline and unity.¹²¹

There are perhaps some disadvantages to removing the proscription against parole from the Code of Conduct. There is certainly the concern that the permission to accept parole could migrate into something more in the minds of PWs. The great advantage of the Code of Conduct is clarity; PWs are not asked to make fine distinctions. The main purpose for designing the Code of Conduct was to "provide members of the Armed Forces with a simple, easily understood code to govern their conduct as American fighting men."¹²²

As demonstrated above, however, even the Code of Conduct is subject to various interpretations from the services. Prugh casts further doubt: "The Code [of Conduct] is probably not designed to prohibit acceptance of special benefits unless the prisoner is somehow compromised by that acceptance."¹²³ Even when the Code of Conduct and DOD guidance prohibit parole, commentators still argue it is legal.¹²⁴ When logic is lacking,

119. STOCKDALE, *supra* note 112, at 296.

120. See Holman J. Barnes, Jr., A New Look at the Code of Conduct 49 (April 1974) (unpublished thesis available in the Air University Library, Maxwell Air Force Base, Ala.). The failure of military authorities to take action against most returning PWs became an issue in *U.S. v. Garwood*, 20 M.J. 148, 152 (C.M.A. 1985), *cert. denied*, 474 U.S. 1005 (1985), wherein Garwood asserted that he was being punished in contravention of Naval directives and statements. Garwood's failure to prevail on the issue was due to his failure successfully to establish a defense of selective prosecution; the court did not dispute that there was a policy of non-prosecution for certain PW offenses.

121. See Barnes, *supra* note 120, at 49. See also, RISNER, *supra* note 112, on the importance of PW unity and discipline.

122. William P. Lyons, *supra* note 112, at 60, 66.

123. Prugh, *supra* note 92, at 691.

124. See *supra* notes 101-107 and accompanying text.

so is clarity. Incentive to follow the code strictly must also be reduced by the knowledge that the consequence for violating it appears to be naught.

The United States trusts its combatants to operate complex equipment in the fog of war. Certainly it can rely on them to understand the concept of a simple parole.

Another potential disadvantage of permitting parole is that PWs who accept parole when offered could be seen as breaking faith with fellow PWs. For example, Vice Admiral Stockdale¹²⁵ opposed the acceptance of parole. It is not clear, however, whether he was totally opposed to the concept of parole or merely opposed to those who accepted parole when it was a clear violation of the Code of Conduct and a compromising of the prisoner.

Herbert Fooks is another example of a military man who believed that parole was a bad idea. He cited three main objections to continuing the custom of parole.¹²⁶ It is instructive to examine his objections, which were the product of that particular moment in history when the United States decided to end any observance of the custom of parole.

The first objection was that observance of the custom may not be practical. This objection collapses of its own weight. Frequently, observance of the Geneva Conventions is not "practical," yet countries are obliged by such agreements to make every effort to limit suffering in war. Further, just because some countries may not observe the custom should not preclude offering parole as an option to nations engaged in armed conflict.

Fooks' second objection was that the nature of warfare had changed so that he believed that the nation with the strongest material, not the greatest personnel, had the advantage. He thought, in other words, that PWs would essentially become irrelevant. This belief is untenable. A military's greatest resource is its people. "People are the decisive factor in war."¹²⁷ In modern warfare, people are the most important element.¹²⁸ To maintain

125. Vice Admiral James Bond Stockdale, USN (ret.) was a PW in North Vietnam from 1965-73. He was the senior Naval Service PW.

126. Fooks, *supra* note 7, at 301.

127. U.S. DEP'T OF AIR FORCE, AIR FORCE MANUAL 1-1, BASIC AEROSPACE DOCTRINE OF THE UNITED STATES 18 (Mar. 1992).

128. THE JOINT CHIEFS OF STAFF, JOINT PUB. 1, JOINT WARFARE OF THE U.S. ARMED FORCES, 2-3 (11 Nov. 1991).

the effectiveness of the people who fight wars, it is vital to maintain morale. Parole is an extraordinary morale program; a chance for PWs to return home safely and with honor.

The final objection to the custom of parole that Fooks expressed was that "modern" war caused the mobilization of nearly the entire nation; thus, farmers, factory workers and everyone involved with production is indirectly connected with the war. His argument was that permitting paroled combatants to engage in even these innocuous tasks could lead to objections by the paroling power. In fact, Fooks' "modern war" is a thing of the past. Now the most common conflict, the type the U.S. military prepares for, is the operation other than war. An operation other than war may be a peace keeping or humanitarian mission.¹²⁹ For this type of conflict, frequently only a small military unit mobilizes. The sponsoring nation may barely know the operation is ongoing. Further, even if a nation fully mobilizes, the paroling power has no valid objection to production related, or even military training, activities. Parolees can legally engage in any activity that is not combat against the paroling country or its allies.¹³⁰

Fooks' concerns are not the only ones, of course. More recently, there have been two additional ones that have come to the forefront. The major reasons parole has been prohibited are that "the enemy never offers parole unless it is to his advantage. Secondly, the POW who enters into a parole agreement with the enemy cannot be trusted by his fellow prisoners."¹³¹

It is true that the enemy may try to use the granting of paroles to some advantage. There are two considerations here, however. First, is there any advantage to be gained? Granting parole may garner some international acclaim, but the long-term effect of that praise on a nation's war effort is bound to be minimal. While the importance of national and international support for a war effort should not be minimized, these issues are no different than any compliance with international law. Compliance may bring political support; noncompliance may bring opprobrium. This in no way mandates against including parole as one of the legitimate components of

129. JOINT PUB. 3-07, *supra* note 111, at III-1.

130. See *supra* notes 114-116 and accompanying text.

131. Lyons, *supra* note 112, at 70.

international law. Further, this issue only goes to whether a power might choose to offer parole, and not the propriety of allowing acceptance.

The greatest advantage to the paroling power may be that it can conserve resources that would otherwise be used caring for EPWs. Resources may be so scarce that they are insufficient to properly support EPWs, as was the case at Andersonville, for instance.¹³² In those instances it seems the United States would trade the small advantage to a probably faltering enemy for the proper care and treatment, at home, for its PWs. Any benefit gained by the paroling power must be balanced against the benefit to the paroled PWs. It is an enormous boon to return home rather than waste away in a PW camp. Returning PWs also avoid the morale drag on active troops that can occur when their comrades are detained for a lengthy period and mistreated.

The propaganda concerns arise largely because of events occurring during the Vietnam conflict. North Vietnam's early releases of American PWs were accompanied by anti-U.S. propaganda.¹³³ Even if a future U.S. adversary were able to mount a propaganda machine as successfully as the North Vietnamese, safely returned PWs are worth the price. Allowing parole does not permit PWs to make disloyal statements. Within the law, therefore, damaging statements by American PWs would be no more likely under a parole system than under the current system. Of course, authorities of the releasing power can say whatever they like, with or without a parole.

Lyons' second concern, that those accepting parole cannot be trusted by their fellow PWs, would not be an issue if parole were explicitly authorized by the Code of Conduct and only allowed under honorable circumstances. Both of these concerns are brought to life by the experiences of Admiral Stockdale who wrote:

[N]o prisoner in North Vietnam was given freedom without "paying them back" with freely given anti-American propaganda. When the announcement was made on the prison loud speakers that three Americans were being given release from prison, we all had the pleasure of hearing a tape recording from

132. The wretched conditions at Andersonville have been well documented. A short description is available in BRUCE CATTON, *A STILLNESS AT APPOMATTOX* 278 (1953); a complete description in ROBERT VAUGHAN, *ANDERSONVILLE* (1996).

133. Barnes, *supra* note 120, at 123 n.166. For example, antiwar activists went to Hanoi to escort many "early release" PWs back to the United States.

each of them urging we who stayed behind to wake up and see the evil of the war and the honor of the Vietnamese People. They urged us to follow in their footsteps. We could tell from the sound of their voices that they had not been physically forced to make those tapes. They were singing like birds and leaving the rest of us to sweat it out. To accept parole in our prisons was to be on the outside of old prisoner friendships for the rest of your life. You were entering the world of an outcast.¹³⁴

VII. Summary

In short, the only valid objection to resurrecting the concept of parole is that an enemy of the United States may ignore the option and choose not to parole U.S. PWs. Still, nothing is lost by offering the option. It is also possible that, in its own selfish interest, a country may offer to parole prisoners of war. After all, use of parole can liberate guards and supplies that would otherwise be used to secure and care for PWs for more proactive warfighting activities.¹³⁵

Although at first the parole proscription seems logical, that impression fails under closer scrutiny. Parole is certainly not the answer to all the problems of PWs. Perhaps no belligerent will ever offer a parole. If even one PW could benefit from the system, however, the United States should offer the option. It could be one small step on the path toward more humane treatment of PWs.

Parole systems have not always been successful, and this one will surely have its problems. There will be those who pledge on their honor not to return to combat who do so anyway. However, while parole is not a perfect solution, it has had enough utility to exist in some form for many hundreds of years. After a brief hiatus of about a century, perhaps it is time to give it another try.

134. Letter from Vice Admiral Stockdale to the author (Feb. 13, 1997). Such disloyal statements were wrong at the time, and would still be wrong if parole were permitted by the United States.

135. BARKER, *supra* note 78, at 183.

THE UNITED STATES AND THE DEVELOPMENT OF THE LAWS OF LAND WARFARE

CAPTAIN GRANT R. DOTY¹

I. Introduction

Historian Geoffrey Best has called the period from 1856 to 1909 the law of war's "epoch of highest repute."² The defining aspect of this epoch was the establishment, by states, of a positive legal or legislative foundation superseding a regime based primarily on religion, chivalry, and customs.³ It is during this "modern" era that the international conference became the forum for debate and agreement between states and the "multilateral treaty" served as the positive mechanism for codification.⁴

While the two major "streams"⁵ or "currents"⁶ of the laws of war ("The Hague Laws" and "Geneva Laws") can trace their beginnings to this epoch, it is the history of "The Hague Laws" which most closely corresponds with this remarkable period. This article examines The Hague "stream" with a particular focus on the United States' role in codifying the laws of land warfare. Specifically, this article seeks to establish a definitive link between General Orders No. 100 issued by the United States in

1. Instructor of International Relations, Department of Social Sciences, United States Military Academy, West Point, New York. B.S., United States Military Academy, 1988; M.A. in International Relations, Yale University, 1996; Formerly assigned as Commander, D Company, 31st Engineer Battalion, Fort Leonard Wood, Missouri, 1992-1993; Executive Officer, Headquarters Company, 27th Engineer Battalion (Combat) (Airborne), Fort Bragg, North Carolina, 1991-1992; Platoon Leader, B Company, 27th Engineer Battalion (Combat) (Airborne), Fort Bragg, North Carolina (including Desert Shield and Desert Storm), 1988-1991. This article is an edited version of a paper the author wrote to satisfy, in part, the M.A. degree requirements for Yale University, New Haven, Connecticut.

2. GEOFFREY BEST, *HUMANITY IN WARFARE* 129 (1980).

3. 2 L. OPPENHEIM, *INTERNATIONAL LAW* §§ 67-69 (H. Lauterpacht ed., 7th ed. 1952). For a thorough historical description of the period before 1856, see BEST, *supra* note 2, at ch. 1-2.

4. Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 116, 119 (Michael Howard et al. eds., 1994).

5. *THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT* xxi (W. Michael Reisman & Chris T. Antonion eds., 1994).

6. FRITS KALSHOVEN, *CONSTRAINTS ON THE WAGING OF WAR* 7-8 (1987).

1863 (often referred to as the Lieber Code)⁷ and The Hague Convention IV Respecting the Laws and Customs of War on Land ratified in 1907.⁸

While anticipating that this historical research would benefit political scientists interested in examining how variations in a state's relative power over a period of years affected its ability to develop and influence international laws and regimes, this analysis may also have significant legal implications. First, the Vienna Convention⁹ recognizes that, though a treaty's text is the primary tool jurists use to interpret and apply the conventional law emanating from a particular treaty (such as the laws of land warfare in Hague Convention IV), it also affirms the relevance of the "legislative history [or] *travaux préparatoires*."¹⁰ Therefore, if the link between codes is not merely circumstantial and tangential but is rather explicit and sequential, in other words if each code served as the basis for the subsequent code, the *travaux préparatoires* of Hague Convention IV of 1907 would logically include the entire history from the Lieber Code onward.

Second, given that the laws of land warfare are based largely on customary law, they gain strength from evidence of "both extensive and virtually uniform" practice.¹¹ Therefore, a more comprehensive historical awareness of the durability and depth of The Hague Law's roots can only help to enhance the legitimacy and strength of the laws themselves. Specifically, if this research confirms, as some assert, that America has played the "leading role in the codification of the laws of war"¹² this could assist United States military legal advisors and manual writers in more effec-

7. Available in INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (Government Printing Office 1898) (1863), reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 3-23 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter Lieber Code].

8. Available in 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1907, at 1204-16 (U.S. Dep't of State ed., 1910); and THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (James Brown Scott ed., 3d ed. 1918); reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 63-92 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter Hague Convention IV].

9. Often called the "Treaty on Treaties" and available in U.N. Doc. A/CONF 39.27 (1969), 1155 U.N.T.S. 336, reprinted in 63 AM. J. INTL. L. 875 (1969) (signed at Vienna 23 May 1969; entered in to force 27 January 1980; not in force for the United States). MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 14 n.19 (2d ed. 1993).

10. JANIS, *supra* note 9, at 29.

11. *Id.* at 46 (citing North Sea Continental Shelf Cases, 1969 I.C.J. 3, 44). See also THE PAQUETE HABANA, 175 U.S. 677 (1900).

12. 1 THE LAW OF WAR: A DOCUMENTARY HISTORY xxii (Leon Friedman ed., 1972).

tively communicating the "gravity and preeminence" of particular norms to their commanders.¹³ Such knowledge could be of great value to American military lawyers.

While not intending to produce a detailed genealogical analysis of each particular article in every existing code, it soon became obvious that the assignment of paternity, from one code to another, was desirable. For if it were demonstrated that an indisputable and sequential thread did exist, scholars could examine code revisions temporally and research records related to those modifications to ascertain what state, non-state, or individual actors brought about particular changes and why.

Albeit subtle allusions to, or inference of, an inter-connectedness between codes, historians and jurists have failed, as far as I could ascertain, to offer explicit proof that a thread truly existed. Therefore, after a brief description of three preparatory conferences, which served as precedents for the more ambitious attempts at creating a comprehensive code governing the laws of land warfare, this article undertakes the task of proving paternity. This analysis will demonstrate the unambiguous evolution starting with the Lieber Code used during the American Civil War through the Russian Proposal for the Brussels Conference¹⁴ and the resulting Brussels Declaration of 1874,¹⁵ via Convention II of the 1899 Hague Peace Conference,¹⁶ and finally ending with Convention IV of the 1907 Hague Peace Conference which is still in force today.

In addition to the implications for international law, proof of a linkage, coupled with the fact that these codes evolved exclusively within the

13. W. Michael Reisman & William K. Leitzau, *Moving International Law from Theory to Practice: The Role of Military Manuals in Effectuating the Laws of Armed Conflict*, in 64 UNITED STATES NAVAL WAR COLLEGE INTERNATIONAL LAW STUDIES, THE LAW OF NAVAL OPERATIONS 1, 5-6 (Horace B. Robertson, Jr. ed., 1991).

14. Available in BRITISH PARLIAMENTARY PAPERS: MISCELLANEOUS No. 1, 1874, C. 1010, at 12-17 [hereinafter Russian Proposal].

15. Available in BRITISH PARLIAMENTARY PAPERS: MISCELLANEOUS No. 1, 1875, C. 1128, at 157-82; and THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 25-34 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter Brussels Declaration].

16. Available in PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1899, at 537-47 (U.S. Dep't of State ed., 1899), reprinted in THE HAGUE CONVENTIONS AND DECLARATIONS OF 1899 AND 1907 (James Brown Scott ed., 3d ed. 1918); reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 63-93 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter Hague Convention II].

proceedings of the three above-mentioned conferences, makes examination of the United States' role, or any actor for that matter, much easier. Subsequent analysis will conclusively demonstrate that the United States' role in the development of the laws of land warfare during this "stream" was insignificant.

II. Groundwork (1856-1868)

"Until the mid-nineteenth century the law of war, although increasingly well-developed, remained, with few exceptions, in the realm of customary international law."¹⁷ While a few bilateral exceptions existed,¹⁸ it was not until 1856 that states made the first "multilateral attempt to codify in times of peace rules which were to be applicable in the event of war."¹⁹

In what Geoffrey Best calls the first "statutory measure" of this period,²⁰ the Declaration of Paris of 16 April 1856, consisted of four articles which abolished privateering, addressed maritime neutrality, and identified elements of a binding blockade.²¹ While negotiated by only seven states,²² most sea powers later acceded to this multilateral declaration.²³ The United States, on the other hand, did not sign this declaration.

The Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of August 1864²⁴ followed the Declaration of Paris. The result of a fifteen state conference, this "brief and businesslike document [of] no more than ten articles" formalized the red cross as a symbol of neutrality and proclaimed the neutrality of the sick, wounded, and those that cared for them.²⁵ The Geneva Convention was initially signed by nine states but "in the course of time almost all the civ-

17. Howard S. Levie, *The Laws of War and Neutrality*, in NATIONAL SECURITY LAW 307, 308 (John Norton Moore et al. eds., 1990).

18. Article XXIV of the bilateral Treaty of Commerce and Amity between the United States and Prussia, dated 1785 (8 Stat. 84), specified how prisoners of war should be treated if the two states should enter into a war. Additionally, Russia and the United States had an agreement, signed in 1854 (10 Stat. 1105), that pertained to the rights of neutrals at sea. *Id.* at 308-09.

19. *Id.* at 309.

20. Best, *supra* note 2, at 139.

21. BRITISH STATE PAPERS 1856, Vol. LXI, reprinted in THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 787-90 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter Paris Declaration].

22. The seven powers were: Austria, France, Prussia, Russia, Sardinia, Turkey, and the United Kingdom. *Id.* at 789.

23. OPPENHEIM, *supra* note 3, at § 68.

ilized states acceded."²⁶ The United States again did not participate nor did it accede to this convention until 1882 because of its tradition avoiding "entangling [European] alliances."²⁷

The final, what may be called preparatory conference—with a narrow scope, but multilateral nonetheless—was the St. Petersburg Conference of 1868.²⁸ Asserting, significantly, "that the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy," the resulting declaration stated simply that no contracting parties would use any exploding or flammable projectile under 400 grams.²⁹ As Roberts and Guelff note, this declaration is "regarded as expressing . . . the customary principle prohibiting the use of means of warfare causing unnecessary suffering" and "led to the adoption of other declarations renouncing particular means of warfare" at The Hague in 1899 and 1907.³⁰

It is in the context of these initial attempts at codifying the customs related to war that the three more comprehensive conferences (i.e., Brussels in 1874; The Hague in 1899; and The Hague in 1907) need to be

24. For the actual text of the Convention for the Amelioration of the Condition of the Wounded Armies in the Field, see *THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS* 279-83 (Dietrich Schindler and Jiri Toman eds., 1988). While the conference which resulted in the Geneva Convention was eventually sponsored by the Swiss Confederation, Henri Dunant (he was also known as J. Henry Dunant) a civilian who consequently won the first Nobel Peace Prize, inspired it. Mr. Dunant, upon seeing the carnage of the battle of Solferino in 1859 was moved to write an influential book, *SOUVENIR DE SOLFERINO* (1862), which proposed the establishment of an international organization which would work with their governments in order to care for sick and wounded soldiers in war. ARTHUR NUSSBAUM, *A CONCISE HISTORY OF THE LAW OF NATIONS* 218-19 (1947).

25. BEST, *supra* note 2, at 150.

26. OPPENHEIM, *supra* note 3, at § 68.

27. NUSSBAUM, *supra* note 24, at 219-20. According to Nussbaum, the United States' eventual official adherence to Geneva in 1882 was the result of the "long and vigorous crusade" led by Clara Barton. Despite its tardy accession, the United States never expressed opposition to its elements. *Id.*

28. Available in *BRITISH PARLIAMENTARY PAPERS LXIV* (1869), reprinted in *THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS* 101-03 (Dietrich Schindler and Jiri Toman eds., 1988).

29. *DOCUMENTS ON THE LAW OF WAR* 30-31 (Adam Roberts and Richard Guelff eds., 1982) [hereinafter *DOCUMENTS*].

30. *Id.* at 29-30.

viewed. Before proceeding, however, let us briefly examine the Lieber Code of 1863.

III. The Lieber Code:³¹ The Root of the Family Tree, not a "Quarry"

The United States' role with respect to the laws of war is most obvious in the case of Francis Lieber's code or General Orders 100. On 17 December 1862, during the American Civil War, Francis Lieber and four general officers were assigned the task of "[proposing] amendments or changes in the Rules and Articles of War, and a Code of Regulations for the government of armies in the field, as authorized by the laws and usages of war."³²

By May 1863, the Adjutant General's Office issued the fruits of Lieber's efforts³³ in the form of "General Orders 100: Instructions for the Government of Armies of the United States in the Field."³⁴ Although it was issued as an order to American soldiers in an internal conflict and was therefore not international in nature, the United States Military Tribunal at Nuremberg noted that army regulations (like, one must assume, the Lieber Code) while not international law *per se*, "might have evidentiary value, particularly if the applicable portions had been put into general practice."³⁵

After an initial draft of his code had been completed on 20 February 1863, Lieber wrote General Halleck, commander of Union forces at the time and a student of international law, stating that "nothing of the kind exists in any language" and that he "had no guide, no ground-work, no text-book."³⁶ While stating a bit dramatically that his "guides" were simply "[u]sage, history, reason, and conscientiousness, a sincere love of

31. Lieber Code, *supra* note 7.

32. George B. Davis, *Doctor Francis Lieber's Instructions for the Government of Armies in the Field*, 1 AM. J. INT'L LAW 13, 19 (1907). Although Francis Lieber was an American, he was born in 1800 in Germany. Between 1815 and 1826 he served in the Colberg Regiment under Bluecher, was wounded at Namur, and fought briefly in the war for Greek independence. He sought political asylum in England in 1826 and arrived in the United States soon afterwards. After teaching at the University of South Carolina for some time, he later moved to New York City where he taught at Columbia University. *Id.* at 13. Dr. Lieber died in 1872.

33. There is little evidence that the four general officers did much more than review Lieber's draft and make minor changes. *Id.* at 19-20.

34. Lieber Code, *supra* note 7.

35. Reisman & Leitzau, *supra* note 13, at 8 (citing 11 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNAL 1237 (1950)).

36. Letter reprinted in DAVIS, *supra* note 32, at 19-20.

truth, justice, and civilization" it seems evident that he produced, as he had claimed, "the law and usage" of war as it existed at the time.³⁷ As the Supreme Court established in *The Paquete Habana* in 1900 after the Spanish American War, evidence of such "ancient usage . . . ripening" contributes to customary law.³⁸

In a later letter (20 May 1863) written after the issuance of General Orders 100, Lieber told Halleck immodestly³⁹ that "it will be adopted as basis for similar works by the English, French, and Germans . . . [and] is a contribution by the United States to the stock of common civilization."⁴⁰ While one should always read self-appraisals skeptically, his assessment, as we will see,⁴¹ was not illusory. In addition to the fact that "similar manuals or codes were issued by Prussia, 1870; The Netherlands, 1871; France, 1877; Russia, 1877 and 1904; Serbia, 1878; Argentina, 1881; Great Britain, 1883 and 1904; and Spain, 1893,"⁴² its greatest impact has been on international codes.

Representative of many recent historians and legal scholars who have written on the subject, Geoffrey Best notes that "[Francis] Lieber's code . . . served as the quarry from which all subsequent codes were cut."⁴³ While a cursory examination of the Lieber Code and later international codes suggests the veracity of Best's conclusion, this colorful and figurative language is misleading. Specifically, this incorrectly implies that legal scholars, military officers, and diplomats kept going back to this "quarry" when they met and wrote subsequent codes. Because this article proves that the Brussels Declaration, Hague Convention II and Hague Convention IV were actually sequential, unless the Lieber Code had an impact on the Russian Proposal or the resulting Brussels Declaration (1874), it logically has had no effect at all. Because this article will show that it did have an effect on those two documents, its subsequent role, therefore, in develop-

37. *Id.* at 20.

38. JANIS, *supra* note 9, at 44 (citing 175 U.S. 677 (1900)).

39. In addition to immodesty, he was perhaps a bit sycophantic, for Halleck was consulted and finally approved of the orders. DAVIS, *supra* note 32, at 20.

40. Letter reprinted in Davis, *supra* note 32, at 20-21.

41. See *infra* notes 84-101 and accompanying text.

42. LESLIE C. GREEN, *THE CONTEMPORARY LAW OF ARMED CONFLICT* 27-28 (1993).

43. BEST, *supra* note 2, at 171. For an example of this tendency in legal texts as well, see EDWARD KWAKWA, *THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION* 11 (1992).

ment of the laws of land warfare was not as a "quarry" but as the root of The Hague Laws' family tree.⁴⁴

While this may appear as semantic quibbling, the distinction is significant beyond mere historical trivia. Specifically, proof of this assertion would provide the opportunity for historians, political scientists, and legal scholars to better trace the evolution of certain rules and note the factors and actors that influenced particular changes. Furthermore, as the introduction notes, this would also contribute to our grasp of customary law, the *travaux préparatoires* of The Hague Laws, and to a more effective presentation of the "gravity and preeminence" of particular norms to United States commanders.⁴⁵

IV. Genealogy

Given the absence of any source that explicitly elucidated the connections from code to code, this next section is an attempt to do just that.⁴⁶

44. See *infra* notes 84-101 and accompanying text. See also Telford Taylor's Forward in 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 12, at xv, for a more apt analogy with a "cornerstone," yet one that neither Taylor nor the editor (Friedman) adequately prove.

45. See *supra* notes 9-13 and accompanying text.

46. An article by article relationship for each of these five codes is presented in a hypertext format as well as excerpts of this paper on the World Wide Web. Grant R. Doty, *The Laws of War Genealogy Project* <http://www.dean.usma.edu/socs/grdoty/laws_war/lawshome.htm> [hereinafter Genealogy]. Visitors to this web site may click any article from any code and this site will provide a genealogical listing of that particular article (i.e., from the Lieber Code of 1863, to the Russian Proposal for the Brussels Conference of 1874, to the resulting Brussels Declaration of 1874, to the Hague Convention II from the Hague Conference of 1899, and finally to the Hague Convention IV from the Hague Conference of 1907). For example, if you click "Article 40" from Hague Convention IV, this site will "jump" to the "MASTER" document which will list:

- Art. 40 (Hague Convention IV, 1907). Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in cases of urgency, of recommencing hostilities immediately.

- Art. 40 (Hague Convention II, 1899). Any serious violation of the armistice by one of the parties gives the other party the right of denouncing it, and even, in case of urgency, to recommence hostilities at once.

- Art. 51 (Brussels Declaration, 1874). The violation of the armistice by one of the parties gives the other party the right of denouncing it.

- Art. 67 (Russian "Proposal," 1874). The violation of the clauses of an armistice by either one of the parties, releases the other from the obligation of carrying them out, and warlike operations may be immediately resumed.

- Art. 145 (Lieber Code, 1863). When an armistice is clearly broken by one of the parties, the other party is released from all obligations to observe it.

The best way to demonstrate a nexus between various conferences and codes is to begin with the most recent convention during this period and work backwards.

A. Hague Convention IV (1907)⁴⁷

In the case of The Hague Laws related to land warfare, the most recent code of this epoch is Convention IV Respecting the Laws and Customs of War on Land stemming from the 1907 Hague Peace Conference.⁴⁸ As the Russian proposal for this conference noted, one of the four agenda items was consideration of "[a]dditions to be made to the provisions of the convention of 1899 [Hague Convention II] relative to the laws and customs of war on land . . ."⁴⁹ Given the use of Convention II of 1899 as the starting point for the 1907 conference one could logically conjecture that the resulting code would bear strong similarities. This assumption is correct.

As the conference transcripts⁵⁰ and an article by article comparison⁵¹ confirm, "the revision of [Convention II] was not undertaken with a view of recasting them but only in order to make amendments in points of detail, and the alterations [made] no very material changes."⁵² Each Hague Convention IV article save one has a close predecessor in the 1899 code. Even the verbiage barely changed; specifically, "that it was found necessary to modify but eleven of the original [Convention II] articles, and to add but three paragraphs . . ."⁵³ is further incontestable evidence of consanguinity.

47. Hague Convention IV, *supra* note 8.

48. As Schindler and Toman note:

[t]he provisions of . . . [Convention IV, like Convention II] are considered as embodying rules of customary international law. As such they are also binding on states which are not formally parties to them . . . [additionally these rules] were partly reaffirmed and developed by the two Protocols Additional to the Geneva Conventions of 1949, adopted in 1977.

THE LAWS OF ARMED CONFLICT: A COLLECTION OF CONVENTIONS, RESOLUTIONS, AND OTHER DOCUMENTS 63 (Dietrich Schindler & Jiri Toman eds., 1988) [hereinafter Schindler & Toman].

49. 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1906, at 1629-31 (U.S. Dep't of State ed., 1909) [hereinafter 2 FRUS 1906].

50. 1 PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1907, PLE-NARY MEETINGS OF THE CONFERENCE 83-85 (Division of International Law of the Carnegie Endowment for International Peace trans., James Brown Scott ed., 1920) [hereinafter 1 PROCEEDINGS 1907].

51. See Genealogy, *supra* note 46.

52. ALEXANDER PEARCE HIGGINS, THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR 261 (1909).

In fact, in Schindler and Toman's *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions, and Other Documents*, the conventions are printed side-by-side, "[a]s the two versions . . . differ only slightly from each other. . . ."⁵⁴ Given such proof, it is not surprising that scholars do not miss this obvious connection between these two codes.

B. Hague Convention II (1899)⁵⁵

Establishing paternity for Convention II with Respect to the Laws and Customs of War on Land and the annexed Regulations of the 1899 Hague Peace Conference is more problematic. Although the 1899 conference agenda,⁵⁶ which included an item listed as "the revision of the declaration in regard to the laws and customs of war, elaborated in 1874 by the Brussels conference and still remaining unratified,"⁵⁷ seems to communicate its kinship, the issuance of the *Oxford Manual*⁵⁸ in 1880 has often misled students of international law.

Published by the Institute of International Law (founded in 1873 with the urging of Francis Lieber⁵⁹), this manual's preface notes:

It may be said that independently of the international laws existing on the subject, there are day-to-day certain principles of justice which guide the public conscience, which are manifested even by general customs, but which would be well to fix and make obligatory. This is what the Conference at Brussels attempted . . . and it is what the Institute of International Law, in its turn, is trying to-day to contribute.⁶⁰

53. GEORGE B. DAVIS, *The Amelioration of the Rules of War on Land*, 2 AM. J. INT'L L. 63, 66-67 (1908).

54. Schindler & Toman, *supra* note 48, at 63.

55. Hague Convention II, *supra* note 16.

56. While some sources such as the INSTRUCTIONS TO THE AMERICAN DELEGATES TO THE HAGUE PEACE CONVENTIONS AND THEIR OFFICIAL REPORTS 3-5 (James Brown Scott ed., 1916) [hereinafter U.S. INSTRUCTIONS AND REPORTS] have listed eight themes or subjects, the United States Department of State lists only seven in Count Mouravieff's second circular. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1898, at 551-53 (U.S. Dep't of State ed., 1901) [hereinafter FRUS 1898]. Regardless, the laws and customs of war are referred to in the next to the last agenda item (sixth or seventh).

57. FRUS 1898, *supra* note 56, at 552.

58. The authentic text was in French and was translated and reprinted in English in RESOLUTIONS OF THE INSTITUTE OF INTERNATIONAL LAW 26-42 (James Brown Scott ed., 1916). Schindler & Toman, *supra* note 48, at 35-48.

59. THOMAS E. HOLLAND, STUDIES IN INTERNATIONAL LAW 88 (1898).

It is this manual's historical placement between Brussels in 1874 and The Hague in 1899, as well as its reference to Brussels, which seems to have caused many scholars to assume that there is some clear relationship between them. An example of this tendency is L.C. Green's comment that the *Oxford Manual* is "equally important" as the Brussels Declaration and that the two documents "provided the basis on which the Hague Convention of 1899 concerning warfare on land rested."⁶¹ Perhaps more of a concern is Schindler and Toman's inclusion of the text of this manual in their collection of texts and their comment that "[m]any of the provisions of the two Hague Conventions can easily be traced back to the Brussels Declaration and the *Oxford Manual*."⁶² This chronologically-based analysis, however, is simply wrong and misleading to scholars who rely on Schindler and Toman's selection of codes.

In addition to the fact that the texts of The Hague deliberations⁶³ confirm that the Brussels Declaration of 1874, and not the *Oxford Manual*, served as the organizing document and touchstone throughout the various debates, an article by article comparison of the codes clearly indicate that the latter's impact was insignificant. In fact, any similarities between the *Oxford Manual* and Convention II are due to the manual's replication of large parts of the Brussels Declaration. Had the *Oxford Manual* never been published it seems unlikely Convention II would have been significantly different.

Specifically, it is clear from a detailed comparative analysis of the Brussels Declaration and Convention II that, notwithstanding minor revisions, only eight articles were newly created at The Hague in 1899 and only two Brussels' articles were completely abandoned.⁶⁴ Most importantly, none of those newly created articles were derived from the *Oxford Manual*. In comparison, eighteen articles in Convention II (almost a third) have no predecessors in the *Oxford Manual*. While the manual may have contributed to the debate of the period, this analysis demonstrates clearly

60. Schindler & Toman, *supra* note 48, at 36.

61. LESLIE C. GREEN, *ESSAYS ON THE MODERN LAW OF WAR* 88 (1985).

62. Schindler & Toman, *supra* note 48, at 25.

63. THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES: THE CONFERENCE OF 1899, at 50-69, 474-578 (Div. of Int'l Law of the Carnegie Endowment for Int'l Peace trans., James Brown Scott ed., 1920) [hereinafter *PROCEEDINGS 1899*].

64. See Genealogy, *supra* note 46.

that its value in the development in the laws of war has been misrepresented.

The importance of this analysis should not be understated. One may now conclude emphatically that the unratified Brussels Declaration was the sole and significant predecessor of Hague Convention II (1899) in this law of land warfare family tree. While the laws of land warfare would be no less valid if they had evolved outside of multilateral conferences (e.g., the *Oxford Manual*), the fact that they did allows scholars to trace their development more clearly by simply examining the very detailed conference minutes and notes. Had the *Oxford Manual* been in the family tree such an inquiry would be more difficult if not impossible. Furthermore, one can now reasonably endeavor to use conference proceedings for Brussels and The Hague Conferences as *travaux préparatoires* for The Hague Laws and to ascertain the United States or any actor's role in evolution of the laws of land warfare.

C. Brussels Declaration (1874)⁶⁵

The study of the Brussels Conference of 1874 is difficult because the resulting "declaration" was never ratified. While it is true that primary source information (English language) is available in the form of dispatches from the British delegate to the conference,⁶⁶ the United States' absence contributes to the paucity of secondary sources on the subject.⁶⁷

As a result of this dearth of material on Brussels, it is not surprising that few historians or legal scholars address this conference and the resulting declaration in much detail. This is despite the fact that it served as the

65. Brussels Declaration, *supra* note 15.

66. See *infra* note 79 and accompanying text.

67. See *infra* notes 107-113 and accompanying text. But see BEST, *supra* note 2, at 345-46 n.43. Best comments in this endnote that following the conference, "[e]very international lawyer, I believe, felt obliged to publish something about [Brussels]." He offers, however, only one English language secondary source and then only a chapter as an example: THOMAS E. HOLLAND, STUDIES IN INTERNATIONAL LAW ch. 3 (1898). Furthermore, a recent (18 February 1998) subject search of the Library of Congress catalog at <<http://webpac.library.yale.edu/webpac-bin/wgbro-ker?02182215113431+%2Daccess+top%2ELib%5FCong>> reveals that only two items exist: one short document written in 1874 and another (in French) written in 1974. FOREIGN AFFAIRS COMMITTEES OF YORKSHIRE, THE BRUSSELS CONGRESS AND DECLARATION OF PARIS: TO THE QUEEN'S MOST EXCELLENT MAJESTY, THE HUMBLE AND LOYAL PETITION OF THE FOREIGN AFFAIRS COMMITTEES OF YORKSHIRE, ASSEMBLED IN CONFERENCE AT KEIGHLEY, MARCH 28, 1875 (1875); JEAN DE BREUCKER, LA DÉCLARATION DE BRUXELLES DE 1874 CONCERNANT LES LOIS ET COUNTUMES DE LA GUERRE (1974).

feeder document for fifty-two out of the sixty Hague Convention II articles.⁶⁸ While some, including Geoffrey Best⁶⁹ and Schindler and Toman,⁷⁰ do acknowledge that Brussels did play a role in the development of the laws of war, there are many scholars who by their omission of material on the subject seem to further the notion that it was not significant. For example, neither Edward Kwakwa's description of the "International Laws of Armed Conflict in Historical Perspective"⁷¹ nor Michael Howard's *The Laws of War*,⁷² make any reference to Brussels. Even Oppenheim's treatise *International Law* minimizes this conference's importance and resulting declaration by citing Brussels only in a footnote and without reference to its role in the lineage in the laws of land warfare.⁷³ This penchant for inadequately addressing the Brussels Conference, for whatever reason, is particularly evident in terms of exploring the foundation of its unratified declaration.

While eventually sponsored by the Russian government, the impetus of the conference was a private group called the Society for the Amelioration of the Condition of Prisoners of War.⁷⁴ This society's president Count de Houedetot, in a letter dated 28 March 1874, citing as precedents both Geneva and St. Petersburg and addressed to "all the Governments of Europe," proposed that states send delegates to a 4 May conference in Paris to address "the treatment of soldiers who become prisoners of war."⁷⁵

In a 6/18 April⁷⁶ dispatch, Prince Gortchakow of Russia, not only responded favorably to the society's invitation, but also noted Russia's intention of "laying before the Cabinets a project for an International Code with the object of determining the laws and usages of warfare."⁷⁷ Subsequently (17/29 April), the Prince forwarded a thirteen chapter (seventy-one article) proposal which he intended to serve as a "starting point for ulterior

68. See *supra* note 64 and accompanying text.

69. Best, *supra* note 2, at 156.

70. Schindler & Toman, *supra* note 48, at 25.

71. Kwakwa, *supra* note 43, at ch. 2.

72. THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD (Michael Howard et al. eds., 1994).

73. Oppenheim, *supra* note 3, §§ 68, 228 n.2.

74. Russian Proposal, *supra* note 14, at 3.

75. *Id.*

76. Russian Old/New dating convention.

77. Russian Proposal, *supra* note 14, at 5-6.

deliberations, which, we trust, will prepare the way for a general understanding" and "definite code."⁷⁸

An examination of the British delegate's (Major General Sir Alfred Horsford) dispatches⁷⁹ provides precise documentation of the nexus between the Russian Proposal and the Brussels Declaration. Of particular note is his comprehensive 4 September 1874 report that first lists the "original [Russian] project," followed by a detailed "résumé of discussion" about the conference deliberation, followed by the "modified text" of the Brussels declaration.⁸⁰ His dispatches can serve as an English speaking scholar's window into the conference and furnish a roadmap of the changes made. An analysis of Horsford's notes plainly indicates that the Russian Proposal served as the model for discussion and is closely related to the final declaration.

Despite this certain relationship between the Russian Proposal and the Brussels Declaration, the former is perhaps the most slighted branch in the laws of land warfare family tree. Although it follows that authors who do not mention Brussels⁸¹ also do not address the Russian Proposal, even those that do mention it often distort its significance.

For example, while Schindler and Toman mention a "draft of an international agreement concerning the laws and customs of war submitted . . . by the Russian Government," their assertion that this "draft" was adopted with only "minor alterations" (but not ratified), belies the fact that of the three conferences, there were more discussions and modifications made between the Russian Proposal and the Brussels Declaration than between Brussels and Convention II (1899) or between Convention II and Convention IV (1907). While it is true that only four articles in the final declaration have no predecessor in the Russian Proposal, seven articles out of seventy-one were completely dropped (compared with two from Brussels to Convention II of 1899 and none between 1899 and 1907).⁸² Significant

78. *Id.* at 5-17.

79. The dispatches can be found in Brussels Declaration, *supra* note 15. Geoffrey Best notes that daily dispatches are "a full-looking account" and that his final report is a "fine summary of it all." BEST, *supra* note 2, at 345-46 n.43.

80. Brussels Declaration, *supra* note 15, at 157-82.

81. See *supra* notes 68-73 and accompanying text.

82. See Genealogy, *supra* note 46. Note that the assertion that no articles were dropped between 1899 and 1907 includes the transfer of articles 57-60 to "Convention (V) respecting the rights and Duties of neutral Powers and Persons in Case of War on Land." Schindler & Toman, *supra* note 48, at 92 n.1.

structural changes were also made (i.e., chapters and headings). Therefore, it seems that Schindler and Toman's decision not to print the Russian Proposal in their self-described "comprehensive collection"⁸³ of texts on the subject is unwise, especially considering their reproduction of the over-rated *Oxford Manual*.

In addition to the problem of not listing the Russian Proposal in collections of codes, the more significant issue is the failure to acknowledge the Russian Proposal's undeniable placement in the family tree or the *travaux préparatoires* of The Hague Laws. While perhaps understandable given the lack of material on the subject, the risks involved are extensive particularly if scholars attempt to demonstrate, as this article does, the specific role of various state, non-state, or individual actors in the development of the laws of war.

D. Russian Proposal (1874)⁸⁴

The source of the Russian Proposal is perhaps the most difficult to pinpoint, in large part due to the lack of material on the Brussels Conference. While research uncovered no writings definitively identifying the source of the Russian Proposal, a number of participants at Brussels made later reference to the role of the Lieber Code. For example, one Russian delegate to both Brussels and The Hague in 1899, Feodor de Martens, made an "allusion [while at The Hague] to [the Lieber Code] and acknowledgment of its value" relative to Brussels.⁸⁵ Additionally, George B. Davis wrote that Dr. Bluntschli, a German legal scholar, and the chairman of the committee on codification at Brussels, admitted that "[i]n the performance of this duty, his chief reliance was the admirable codification which had been prepared by Doctor Lieber . . . so that the Brussels code bears in every article a distinct impression of the [Lieber Code], prepared eleven years before by his lifelong friend and co-worker."⁸⁶ While these quotes, coupled with the fact that General Orders 100 (Lieber Code) was "the first official attempt to gather together in one document substantially all the customary law of war on land,"⁸⁷ seem to support the conclusion that it must have played some role at Brussels in 1874, it is not evident that an

83. Schindler & Toman, *supra* note 48.

84. Russian Project, *supra* note 14.

85. U.S. INSTRUCTIONS AND REPORTS, *supra* note 56, at 45.

86. Davis, *supra* note 32, at 22.

87. Levie, *supra* note 17, at 309.

explicit article by article connection with the Russian Proposal has ever been established.

Despite testimony from Brussels participants seeming to confirm a close relationship between codes, some historians still do not even mention Lieber's impact on Brussels or the Russian Proposal.⁸⁸ Those that do mention these codes have likely skirted the paternity issue because of the apparent lack of conclusive proof of the lineage between Lieber and the Russian project (in comparison with the extensive evidence that exists for the two Hague Conferences in the form of widely disseminated conference proceedings). As a result, scholars have either written cryptically that the Brussels' "debates were based on a Lieber-like Russian draft code"⁸⁹ or broadly that the Lieber Code "prepared the way for the calling of the 1874 Brussels Conference and the two Hague Peace Conferences . . ."⁹⁰ While not incorrect, these claims imply a relationship that may or may not exist.

Legal texts have also been less than clear. While some texts do not even make reference to Lieber or Brussels,⁹¹ one author who does, writes simply that the Lieber Code, "served as a model for subsequent codification efforts" and does not even mention the Russian Proposal or Brussels.⁹² Oppenheim's *International Law*, which does acknowledge that Lieber did represent the "first endeavour to codify the laws of war" makes no mention of any explicit connection between Lieber's code and the Russian Proposal (which he does not mention) or the Brussels Declaration (which he mentions simply in a footnote).⁹³ The most resolute yet brief expression of a relationship between these codes can be found in Schindler and Toman's introduction to the Lieber Code. They write:

[The Lieber Code] strongly influenced the further codification of the laws of war and the adoption of similar regulations by other states. They formed the origin of the project of an international convention on the laws of war presented to the Brussels Confer-

88. See, e.g., HOWARD, *supra* note 72.

89. BEST, *supra* note 2, at 156.

90. DOCUMENTS, *supra* note 29, at 7. But see, CALVIN D. DAVIS, THE UNITED STATES AND THE FIRST HAGUE PEACE CONFERENCE (1962). Davis is slightly more helpful acknowledging a close relationship between codes because he cites de Martens as commenting later that the Lieber Code "inspired much of the work of the Brussels Conference." *Id.* at 132.

91. See, e.g., JANIS, *supra* note 9, at 162-76.

92. KWAKWA, *supra* note 43, at 11.

93. OPPENHEIM, *supra* note 3, §§ 68, 228 n.2.

ence in 1874 and stimulated the adoption of the Hague Conventions on land warfare of 1899 and 1907.⁹⁴

Even this passage, however, does not offer incontestable evidence of the source of the Russian Proposal, like that which exists for the other codes. Specifically, while the other codes evolved in conferences which provide researchers evidence in the form of minutes or diplomatic dispatches, any proof of similarities between General Orders 100 and the Russian Proposal beyond mere testimonials from Brussels participants must come from a detailed comparative analysis of each code.

While any numerical comparison between the 157 article Lieber Code and the 71 article Russian Proposal is likely to result in the snap judgment that there could not possibly be a relationship, this is incorrect.⁹⁵ In fact, the length of General Orders 100 is due in large part to three factors. First, many of Lieber's articles were not "laws" as is the case with the previously discussed codes, because of his stylistic use of articles as paragraph marks. For example, he uses one article (article 54) merely to define "hostages" and another (article 40) to declare that "[t]here exists no law or body of authoritative rules of action between hostile armies, except that branch of the law of nature and nations which is called the law and usages of war on land."⁹⁶ Second, the Lieber Code was written as an order for an army fighting a civil and not international war. Finally, it was not a consensus document like the multilateral treaties of The Hague or Brussels. As Thomas Holland wrote in 1898, the Lieber Code was "perhaps unnecessarily long and minute . . . not well arranged, and certainly more severe than the rules which would be generally enforced in a war between two independent states."⁹⁷ This critique, however, should not preclude a more measured judgment based on a detailed analysis of the articles.

Such an analysis is clear. Although fifty-three out of the original 157 were seemingly discarded by the Russian Proposal, it is just as accurate to stress that only twelve of the seventy-one articles in the Russian Proposal do not seem to have a predecessor in Lieber's code.⁹⁸ While it is true that the verbiage between the Lieber Code and the Russian Proposal is significantly different relative to other codes examined here, the themes and content are quite similar.⁹⁹ This methodology of comparing articles together

94. Schindler & Toman, *supra* note 48, at 3.

95. See Genealogy, *supra* note 46.

96. Lieber Code, *supra* note 7.

97. Holland, *supra* note 59, at 85.

98. See Genealogy, *supra* note 46.

with the allusions to the Lieber Code made by Brussels' participants,¹⁰⁰ including Russians, does seem to provide substantial evidence of a direct genealogical relationship.

E. Lieber to the Hague

Given the above discussion, a comprehensive and temporal analysis of the various articles from Lieber to the Hague Convention IV of 1907 shows, not surprisingly, that over two-thirds of the fifty-six articles in Hague Convention IV can be effectively traced from the Lieber Code of 1863, through the Russian Proposal for the Brussels Conference and the Brussels Declaration of 1874, via the Hague Convention II of 1899, to the Hague Convention IV of 1907.¹⁰¹

As mentioned in the introduction, establishing the existence of a sequential thread or family tree contributes to international law two ways. First, it demonstrates the clear and lengthy, but generally unrecognized, legislative history for the laws of land warfare. Second, this analysis furthers our grasp of the durability and depth of The Hague Laws' roots. This evidence, coupled with the fact that the articles in these codes evolved beginning with Brussels in 1874 exclusively within the proceedings of the above-mentioned conferences, makes determination of the impact of specific state, non-state, and individual actors much easier.

Given that the role of the United States in the development of the Lieber code was as obvious as it was significant, the remaining chronological analysis, therefore, focuses solely on the United States' role during the three conferences of 1874, 1899, and 1907. As this research will demonstrate, the promulgation of General Orders 100 in May 1863 was in fact the high water mark of United States efficacy in the development of the laws of war.

99. The verbiage differs, one must conclude, because of the different formats (i.e., order versus international law) and more importantly because the author of the Russian Proposal was not limited, as were those who modified the other codes in the forum of an international conference, to merely deviating from a previous international code.

100. See *supra* notes 85-86 and accompanying text.

101. See Genealogy, *supra* note 46.

V. The United States and the Development of the Laws of Land Warfare

A. The United States and the Russian Proposal and Brussels Declaration, 1874

While seldom cited,¹⁰² the Brussels Conference (and by correlation the Russian Proposal which served as the basis for debate), was arguably the most important conference of the three discussed in this article. The United States' absence meant that it did not participate in the debates which eventually produced a code from which forty-five articles (out of fifty-six) are predecessors of articles in Hague Convention IV.¹⁰³ In these terms, it had more impact on the laws of war than any other conference. The major question for this section, therefore, is not what influence the United States had at this conference, for it had none. The questions are rather why did the United States not attend and was its absence an abdication of its power to affect the rules of war.

As mentioned previously,¹⁰⁴ a private organization desiring that "all the Governments of Europe" meet to discuss "the treatment of soldiers who become prisoners of war" originally proposed this conference.¹⁰⁵ A 16 May 1874 memorandum from the Society for the Amelioration of the Condition of Prisoners of War to Britain's Derby seems to indicate that the Russians desired that "different American and Asiatic States" be invited to the conference.¹⁰⁶ Despite this fact, however, it appears that no invitation was extended to any non-European states until July, and then only to Persia and the United States.¹⁰⁷

While a search of U.S. Department of State records¹⁰⁸ reveals no mention of any invitation (also recall the dearth of English language books on the subject),¹⁰⁹ a British Foreign Office telegraph dated 18 July provides the only clue that the United States was in fact invited. It states simply that "[t]he Russian Government invited the Government of the United States on [8 July], and again [on 17 July], to be represented at [the] Brus-

102. See *supra* notes 66-73 and accompanying text.

103. See *Genealogy*, *supra* note 46.

104. See *supra* note 74 and accompanying text.

105. Russian Proposal, *supra* note 14, at 3.

106. *Id.* at 19-20.

107. BRITISH PARLIAMENTARY PAPERS: MISCELLANEOUS NO. 2, 1874, C. 1083, at 2, 8.

108. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES (U.S. Dep't of State ed., various).

109. See *supra* notes 66-73 and accompanying text.

sels Conference. The Government of the United States have [sic] declined, on the ground[s] of the lateness of the invitation."¹¹⁰

While twenty-one days may have been insufficient notice, it also seems plausible that the United States' aversion to "entangling" itself in Europe (as evidenced by its continued failure to accede to the Geneva Convention of 1864) played a role.¹¹¹ The lack of primary documents or secondary sources on the subject of the United States' views, however, makes this unclear. Similarly unclear is the influence the United States would have had at the conference had it attended. America was not a great power at the time, and Lieber's death in 1872 left it without a prominent jurist on the subject who may have significantly influenced the debate.

Regardless of such counter-factual suppositions, rejecting the invitation to attend the conference in any capacity (e.g., as an observer) or for whatever reason, resulted not only in its inability to influence the proceedings (notwithstanding the impact of the Lieber Code)¹¹² but also its ability to follow or report on the conference. This, and perhaps the lack of significance that the United States placed on this conference, is evident in the first U.S. dispatch related to the Brussels Conference, written after its conclusion. In this document, the diplomat Eugene Schuyler noted, "as the proceedings of the congress have been kept secret, and it has been impossible for me to communicate anything more than rumors of its actions and occupations, I have refrained from writing you on the subject."¹¹³

At the time, the failure to ratify the concluding declaration may have appeared to vindicate the United States' decision not to attend the conference in Brussels. Such an assessment, however, would be wrong owing to the comparatively minor changes to the laws of war that subsequent conferences enacted.¹¹⁴

110. BRITISH PARLIAMENTARY PAPERS: MISCELLANEOUS No. 2, 1874, C. 1083, at 8. The eventual attendees included delegates from Germany, Austria, Belgium, Spain, France, Greece, Italy, Netherlands, Portugal, Russia, Sweden, Switzerland, Turkey, Denmark, and Great Britain.

111. NUSSBAUM, *supra* note 24, at 219-20.

112. See *supra* notes 85-86 and accompanying text.

113. PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1874, at 1014 (U.S. Dep't of State ed., 1875). Only 39 pages are devoted to a *post hoc* analysis of the Brussels Conference.

114. See Genealogy, *supra* note 46.

B. The United States and Hague Convention II, 1899

Two weeks after the United States signed a protocol ending hostilities with Spain, and almost twenty-five years after Brussels, the Russians again called for an international peace conference. A 12/24 August 1898 rescript issued for the Czar by Count Mouravieff, the Russian Minister for Foreign Affairs, stated that the narrow purpose of this meeting was the discussion of the "grave problem" of checking the increase in armaments.¹¹⁵

This time, however, unlike the tardy invitation to the Brussels Conference, the response from the United States was favorable.¹¹⁶ Although most states attributed this rescript to self-serving Russian motives, and while there was at least some skepticism of Russia's intent within the United States,¹¹⁷ President William McKinley's response to the original August invitation was reportedly, "Why, of course we will accept it."¹¹⁸

It is highly questionable, however, that the apparent U.S. enthusiasm can be attributed to the concurrence of United States and Russian views towards disarmament. Unlike the United States which was a rising world power, Russia was burdened by the economic and social costs of keeping pace in a highly militarized and competitive European state system. The United States was a likely candidate for increased military spending and exertion. Their apparent excitement, therefore, likely rested in the desire to satisfy the significant international and U.S. peace movements.¹¹⁹

Four months after Russia distributed the original rescript with its narrow agenda on limiting armaments, they issued a follow-up circular which was much broader in scope.¹²⁰ Dated 30 December 1898/11 January 1899, this document identified seven¹²¹ "themes to submit to an international discussion at the actual conference."¹²² Notably, the second to the last item was the "revision of the declaration in regard to the laws and customs of war, elaborated in 1874 by the Brussels conference and still remaining unratified."¹²³

After Russia announced that the neutral Dutch would play hosts at The Hague and the date was set for 18 May 1899, the United States began

115. FRUS 1898, *supra* note 56, at 541-42.

116. DAVIS, *supra* note 90, at 38-39.

117. See *id.* at 38-46 for an explanation of the perceived and actual motives behind the rescript.

118. CALVIN D. DAVIS, THE UNITED STATES AND THE SECOND HAGUE PEACE CONFERENCE: AMERICAN DIPLOMACY AND INTERNATIONAL ORGANIZATION 7 (1975).

its preparation for the conference.¹²⁴ The first task for the United States was selecting the delegation. After some fierce lobbying by aspiring delegates and their patrons, in mid-March, President McKinley finally selected Ambassador Andrew White to head the delegation.¹²⁵ After adding Seth Low, Stanford Newel, and George Frederick Holls as delegation secretary, the State Department turned to the question of military delegates.¹²⁶ Secretary of State John Hay suggested, and President McKinley approved, the appointment of Captain Alfred Thayer Mahan, author of *The Influence of Sea Power* (1890), a prestigious addition to the delegation. For an Army representative, "Secretary Hay consulted the adjutant general of the army General H.C. Corbin, and Corbin suggested an ordnance

119. One European leader was cited as stating that there was a "bit of devilry" in the call for the conference because any state who refused to attend would be branded as wanting to "break the peace." DAVIS, *supra* note 90, at 40. An analysis of official diplomatic correspondence reveals that U.S. statesmen sought to "satisfy the expectations and longings of the peace movement while sacrificing none of the essential demands of the movement for war." For example, the Department of State's "Instructions to the American Delegates," included an annex which noted: "[t]he introduction of a brief resolution (regarding international arbitration—a popular cause for the American peace movement) at an opportune moment . . . would at least place the United States on record as a friend and promoter of peace" 2 PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1907, at 1142 (U.S. Dep't of State ed., 1910) [hereinafter 2 FRUS 1907]. In the body of the instructions, there is the more realistic observation that the idea of halting military increases was "at present, so inapplicable to the United States . . . [that it] could not be profitably discussed." PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1899, at 511-13 (U.S. Dep't of State ed., 1901) [hereinafter FRUS 1899].

120. FRUS 1898, *supra* note 56, at 551-53; DAVIS, *supra* note 90, at 50-53.

121. See *supra* note 56 and accompanying text (discussion of actual number of agenda items).

122. FRUS 1898, *supra* note 56, at 552.

123. *Id.* at 552. The other "subjects" included: (1) a limitation or reduction in land and naval forces/armaments; (2) disallowing the use of new firearms or explosives more powerful than currently used; (3) limitation of explosives and prohibition of dropping projectiles from balloons; (4) prohibition of the use of submarines or ships armed with rams; (5) adaptation of the Geneva Convention of 1864/68 for naval war; (6) the neutralization of naval vessels to rescue those shipwrecked after naval battles; and (7) the use of good offices, mediation, and voluntary arbitration in order to prevent armed conflict. *Id.* at 552-53.

124. DAVIS, *supra* note 90, at 52-53.

125. *Id.* at 64-73.

126. *Id.* at 73-74.

officer, Captain William R. Crozier," an officer like Mahan with no legal expertise.¹²⁷

David Jayne Hill, Assistant Secretary of State, was assigned the job of preparing the official "instructions to the American delegates," which were dated 18 April 1899, and were embarrassingly short and vague on the issue of the laws and customs of war.¹²⁸ The instructions stated simply that:

The fifth, sixth, and seventh articles, aiming in the interest of humanity to succor those who by the chance of battle have been rendered helpless, thus losing the character of effective combatants, or to alleviate their sufferings, or to insure the safety of those whose mission is purely one of peace and beneficence, may well awake the cordial interest of the delegates, and any practicable propositions based upon them should receive their earnest support.¹²⁹

The singular reference to those wounded in battle and those attempting to rescue them implies an inadequate understanding of the scope or content of the Brussels Declaration. While this instruction seems at least partially applicable to the fifth and sixth items dealing with the application of the Geneva Convention to naval warfare and the neutralization of vessels attempting to rescue shipwrecked sailors, it offers practically no useful guidance to properly evaluate the more comprehensive laws of land warfare.¹³⁰

At the conference, the second subcommission of the second commission dealt with the laws of land warfare (the first subcommission dealt with laws of maritime warfare).¹³¹ Contrary to what Leon Friedman infers in his "documentary history"¹³² of the law of war, the head of the United States delegation, the so-called "leading figure" of international law, Andrew White, played no significant role in the debates of the two subcommission regarding of the laws of war.¹³³ While Newell, a lawyer, was

127. *Id.* at 75.

128. *Id.* at 75.

129. FRUS 1899, *supra* note 119, at 512.

130. It is also possible that the Department of State read the Russian circular with the view that the items dealing with firearms and explosives, having been listed first, were more significant.

131. DAVIS, *supra* note 90, at 125.

132. 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 12, at xiv-xv, xxiii, 153.

also a member of the second commission, he allowed the two military men, both non-lawyers, Mahan in the first subcommission and Crozier in the second, to do the United States bidding. As Calvin Davis notes, "at no time did [Newell] say anything in the commission—or any other part of the conference—which reporters thought worthy of recording."¹³⁴

While Mahan's role in the first subcommission was notable despite his lack of legal experience, one historian writes bluntly that, "while Crozier listened, the second subcommission revised the laws of war in the Declaration of Brussels."¹³⁵ During the twelve meetings of the subcommission, Crozier only spoke up five times and two of those were to ask for mere clarifications.¹³⁶ He did successfully speak in favor of the rights of small powers by supporting the successful elimination Article Four of the Brussels Declaration.¹³⁷ Opposition to this article, which addressed the obligation of government officials of occupied states to faithfully support the occupying army, was based, Crozier asserted, on his "guiding principle" that the United States "did not fear invasion but could afford to be as humane towards invaded countries as anybody."¹³⁸

The second and final so-called "contribution" that Crozier made to the development of the laws of war regarded the seizure and destruction of private property (Article 13g of the Brussels Declaration which became Article 23g in Convention II and IV).¹³⁹ Because he knew that the issue of private property at sea, which was not an agenda item, was important to the United States, he suggested that the combined issue (i.e., private property

133. DAVIS, *supra* note 90, at 122.

134. *Id.* at 127.

135. *Id.* at 132-33.

136. PROCEEDINGS 1899, *supra* note 63, at 521, 536, 555, 558.

137. Brussels Declaration *reprinted in* Schindler & Toman, *supra* note 48, at 28.

138. DAVIS, *supra* note 90, at 133.

139. *Id.* at 133. The text of article 13g reads: "Any destruction or seizure of the enemy's property that is not imperatively demanded by the necessity of war [is forbidden]." Schindler & Toman, *supra* note 48, at 29.

at sea and on land) be considered by another division of the conference. Not surprisingly, this had no effect on the laws of land warfare.¹⁴⁰

While he may have been understating Mahan's role, Crozier's self-analysis was correct when he later wrote that:

Mahan and I have had little or no constructive work, that has nearly all fallen to the lot of the people attending to arbitration, but we have had to be constantly on guard that something unfavorable to the United States should not find its way into agreements. Sentinel duty is fatiguing.¹⁴¹

The lack of any real United States contribution to the "laws of land warfare" debate, is not all that surprising for three reasons. First, as mentioned above, the "instructions" failed to discuss the United States' objectives regarding the laws of land warfare which reveals that either the author (i.e., David Jayne Hill) did not grasp that agenda item or this was not an area of interest to the United States.¹⁴²

Second, Crozier was clearly selected based on his qualifications as the inventor of a gun carriage, wire wrapped rifle, and an improved ten-inch gun, not for being a lawyer.¹⁴³ Some believe that Crozier's selection revealed a conscious decision by the Department of State to ensure that "decisions at The Hague restricting improvement of war equipment should not hinder the military development of the United States."¹⁴⁴ While his efforts in the armaments debates (first commission) were noteworthy, his lack of legal background or preparation for the discussions surrounding the laws and customs of war is embarrassing. In fact, his lack of legal interest and preparation was glaringly revealed when he telegraphed the adjutant general on 13 June (almost a month into the conference) and asked that a copy of the Lieber Code be sent to him.¹⁴⁵

Finally, as a mere army captain, he held the lowest rank of any of the primary military delegates. One may conjecture that his exclusion from one informal meeting with respect to the Dum Dum bullet debate was very

140. PROCEEDINGS 1899, *supra* note 63, at 491-93.

141. DAVIS, *supra* note 90, at 136.

142. See *supra* note 129 and accompanying text.

143. FREDERICK W. HOLLS, THE PEACE CONFERENCE AT THE HAGUE AND ITS BEARINGS ON INTERNATIONAL LAW AND POLICY 40-41 (1900).

144. DAVIS, *supra* note 90, at 132.

145. *Id.* at 132.

likely the result of his lack of rank and may have been evidence of a conference-wide problem as well.¹⁴⁶

Regardless of the cause, the United States did not play a major role in developing Convention II with Respect to the Laws and Customs of War on Land and the annexed regulations. While it is true that only minor modifications from Brussels were made,¹⁴⁷ this seems like a further case of the United States abdicating what power it may have had to affect the rules of land warfare.

C. The United States and Hague Convention IV, 1907

The final forum for debating and altering the laws of war during this epoch and within The Hague "stream" of international law, was the Second Hague Peace Conference of 1907. By this conference, it appears the United States had finally learned most of the lessons from 1874 and 1899. Specifically, it did attend the conference and it did send a very qualified and high ranking army officer as a delegate. The results, however, were similar.

Although in 1904 the United States had suggested holding a second peace conference,¹⁴⁸ it was not until the termination of the Russo-Japanese War, that Russia proposed another meeting at The Hague.¹⁴⁹ In April 1906, the Russians issued a "programme of the contemplated meeting" which included four items, one of which was the consideration of "[a]dditions to be made to the provisions of the convention of 1899 relative to the laws and customs of war on land . . ."¹⁵⁰

For a year after the issuance of the proposed agenda, there was significant diplomatic discussion regarding the issue of disarmament which delayed the selection of a conference date. During this period, the United

146. HOLS, *supra* note 143, at 38-52, 103-104.

147. As mentioned earlier, a detailed comparative analysis of the 56 article Brussels Declaration and the 60 article Hague Convention II reveals that notwithstanding minor revisions, only eight articles were newly created at the Hague in 1899 and only two Brussels' articles were abandoned. See *supra* note 64 and accompanying text.

148. DAVIS, *supra* note 118, at 111-12.

149. 2 FRUS 1906, *supra* note 49, at 1629-31. See also DAVIS, *supra* note 118, at 123.

150. 2 FRUS 1906, *supra* note 49, at 1629-31. The other items were: (1) improvements to the convention relative to the peaceful settlement of international disputes regarding the court of arbitration and international commissions of inquiry; (3) a convention relative to the laws and customs of naval warfare; and (4) additions to the convention of 1899 for the adaptation of the Geneva Convention of 1864 to maritime warfare. *Id.*

States began announcing the members of its delegation. The top delegate, Joseph Hodges Choate, who was often called the "head of the American Bar," was clearly a "good choice."¹⁵¹ Horace Porter, Uriah Rose, and David Jayne Hill completed the civilian portion of the delegation and the military delegates were Admiral Charles Sperry and General George B. Davis.¹⁵²

Davis, as the army representative who would attend the meetings related to the laws of land warfare, stood in sharp and impressive contrast to Crozier in the first conference. After enlisting at age sixteen and serving in the Civil War, he graduated from West Point in 1871 as a cavalry officer.¹⁵³ He later joined the Judge Advocate Corps in 1888 and his service as a professor of law at his *alma mater* provided him the opportunity to write extensively on the subjects of military and international law, including the laws of war.¹⁵⁴ His books were all considered "standards in [their] respective branches."¹⁵⁵ In 1901 he was promoted to the rank of Brigadier General and was assigned as the Judge Advocate General of the Army, a position he held for ten years, during which time he served as the legal advisor to the Secretary of War and as a delegate not only to the second peace conference, but also to the Geneva conferences in 1903 and 1906.¹⁵⁶ Undoubtedly he was as qualified a military delegate that the United States could have sent to The Hague.

On 20 April 1907, ten days after the date of the conference was finally determined, the United States delegation met to discuss the positions they ought to take, the only meeting of the entire delegation "for which a record exists."¹⁵⁷ While unable to find the minutes of that meeting¹⁵⁸ which historian Calvin Davis used in his book on the subject, his synopsis makes no

151. DAVIS, *supra* note 118, at 125.

152. *Id.* at 125-128.

153. FORTY-SIXTH ANNUAL REUNION OF THE ASSOCIATION OF GRADUATES OF THE UNITED STATES MILITARY ACADEMY AT WEST POINT, NEW YORK, JUNE 11TH 1915, at 129-30 (USMA Association of Graduates ed., 1915) [hereinafter USMA REUNION 1915].

154. *Id.* at 131-33.

155. *Id.* at 133. Additionally, one of his texts, revised and issued after his death, located in the Yale Law School Library included evidence of his standing in the legal community. GEORGE B. DAVIS, THE ELEMENTS OF INTERNATIONAL LAW, WITH AN ACCOUNT OF ITS ORIGIN, SOURCES, AND HISTORICAL DEVELOPMENT inscription, back inside cover (Gordon E. Sherman ed., 4th ed. 1916). Specifically, Simon Baldwin, the head of the Yale Law School handwrote a note to the editor that "it is a tribute to his memory that you found so few changes necessary."

156. USMA REUNION 1915, *supra* note 153, at 135-36.

157. DAVIS, *supra* note 118, at 173.

mention to the laws of land warfare. In contrast, "questions about the use of sea power in war received more attention than [any other issue]."¹⁵⁹ This emphasis on sea power and the neglect of issues related to land warfare was, one will see, similarly evident in the delegation's "instructions,"¹⁶⁰ and seems to confirm the view that the United States saw itself as a naval power. While beyond this article's scope, an analysis of the effect of the United States' self-perception as a naval and not a land power on defining its role in the development of the laws of land versus naval warfare clearly is an area ripe for further research.

Immediately following this meeting, Elihu Root, the Secretary of State, began to write the "instructions to the American delegates."¹⁶¹ While they were four times as long as those for the first conference, the lack of discussion in the preparatory meeting on the subject of the law of land warfare was mirrored by a dearth of guidance in the official instructions. When they were finally issued, after the delegates had left for The Hague, the instructions referring to the laws of land warfare, stated in their entirety:

Since the code of rules for the government of military operations on land was adopted by the First Peace Conference there have been occasions for its application under very severe conditions, notably in the South African war and the war between Japan and Russia. Doubtless the powers involved in those conflicts have had the occasion to observe many particulars in which useful additions or improvements might be made. You will consider their suggestions with a view to reducing, so far as is practicable, the evils of war and protecting the rights of neutrals.¹⁶²

It is this short and vague passage, characteristic of the United States' apparent lack of interest in the laws of land warfare, and not General Davis' seemingly exceptional legal qualifications and military rank, that

158. Calvin Davis' footnote says "Minutes, Am. Commission Apr. 20, 1907, pp. 1-4" yet research uncovered no bibliographic reference to such a source. DAVIS, *supra* note 118, at 170 n.2.

159. DAVIS, *supra* note 118, at 171.

160. See *infra* note 161 and accompanying text.

161. 2 FRUS 1907, *supra* note 119, at 1128-44.

162. *Id.* at 1137.

presaged the passive role that he, and therefore the United States, took during this conference.

It was the first subcommission of the second commission that dealt with the laws of land warfare. Because "[t]here was general agreement that the 1899 Convention [II] Concerning the Laws and Customs of War on Land had proved satisfactory," they were able to complete their enterprise in three working meetings over a three week period.¹⁶³ As mentioned earlier there were "no material changes" to Convention II.¹⁶⁴ While a review of the subcommission transcripts indicates that some countries' delegates did participate actively by proposing amendments and debating possible changes, General Davis did not speak once during the any of the deliberations.¹⁶⁵ As Calvin Davis writes:

Throughout the deliberations of the subcommission [Davis] had nothing to say. His silence was perhaps unfortunate, for no delegate knew more than he of the development of the laws of war during the American Civil War; the analysis of the 1899 convention [II] which he had prepared for his delegation would have proved useful to the delegates of other nations.¹⁶⁶

Davis' inactivity, which seemed to be foreshadowed by his instructions, meant that for the third conference, the United States did not contribute to the development of the laws of land warfare.

The fact that only minor changes were made to Convention II of the 1899 Hague Peace Conference,¹⁶⁷ demonstrating the existence of a consensus among participants, might vindicate the United States' indolence. This theory, while perhaps merited in explaining a single instance of quiescence, is, however, unsatisfying if applied to each and every conference, for it fails to effectively capture the multiple factors which seem to have contributed to its passivity during this epoch.

163. Davis, *supra* note 118, at 200.

164. See *supra* note 53 and accompanying text.

165. 3 PROCEEDINGS OF THE HAGUE CONFERENCES: THE CONFERENCE OF 1907, MEETINGS OF THE SECOND, THIRD, AND FOURTH COMMISSIONS 97-144 (Div. of Int'l Law of the Carnegie Endowment for Int'l Peace trans., James Brown Scott ed., 1920) [hereinafter 3 PROCEEDINGS 1907].

166. DAVIS, *supra* note 118, at 207.

167. See *supra* note 53 and accompanying text.

VI. Conclusion

The United States' repeated failure to use what power it had in 1874, 1899, and 1907 to affect the evolution of the laws of land warfare clearly had multiple causes. First, there was the failure to even attend the Brussels Conference due to either tardiness of invitation or aversion to "entangling alliances."¹⁶⁸ In 1899 it was the possible misreading of the czar's circular¹⁶⁹ and the assignment of a low ranking armaments inventor rather than a legal scholar as the military delegate.¹⁷⁰ The lack of effective conference preparation or instructions¹⁷¹ and the United States' self-perception as a naval and not a continental power¹⁷² had an impact in both Hague conferences. While ascertaining the proportional impact of each of these factors may be difficult, the net effect is indisputable and contrary to what Telford Taylor implied in his Forward to *The Law of War: A Documentary History*.¹⁷³ Specifically, following the publication of Lieber's code as General Orders 100 in 1863, the United States did not effectively contribute anything to The Hague Laws relating to land warfare as they evolved during this period.

While the case of the United States may seem simplistic given its inactivity in these three conferences, it does provide both an insight into the United States' outlook, interests and behavior during this period, and is a good illustration of what scholars can accomplish with the "laws of war-family tree" firmly established.¹⁷⁴

The conference records are detailed enough for historians or political scientists to easily select any state, non-state or individual actors and examine their particular role in the evolution of laws of land warfare. Having gleaned such information from the historical record, one could determine how a country's relative power in the world was put to use in the development of the laws of war. While these conferences were consensus forums, one might fairly hypothesize that the greater a state's power the more influence they possessed in the conferences. Additionally, one might examine how a state's self-image as a naval or continental power, status quo or revisionist power, rising or falling power, affected its interests and

168. See *supra* notes 103-114 and accompanying text.

169. See *supra* notes 129-130 and accompanying text.

170. See *supra* notes 127, 143-146 and accompanying text.

171. See *supra* notes 128-129, 157-162 and accompanying text.

172. See *supra* notes 157-160 and accompanying text.

173. See *supra* note 10 and accompanying text.

174. See *Genealogy*, *supra* note 46.

behavior. Furthermore, one could ascertain what other factors such as just completed wars (e.g., the Franco-Prussian War before Brussels, the Spanish-American War before the 1899 Hague Conference, or the Russo-Japanese War before the 1907 Hague Conference) or existing and prospective alliances may have affected these conferences. These are just a few of the insights that this analysis may provide.

This article reveals a number of areas ripe for further historical research. Above all else, given this "family tree," similar analyses can and should be done for other individuals (e.g., de Martens), non-state (e.g., Red Cross) or state (e.g., Great Britain) actors. Of particular note, one must ask why Russia played such a dominant role during this epoch.¹⁷⁵ Given the dearth of material on the subject, the Brussels Conference of 1874 appears to be the most promising subject for future inquiry. Lastly, a comparison between the United States Army and Navy regarding their outlook and preparation for these conferences is intriguing.

Proof of a "family tree" contributes to international law as well. Given that the link between codes is in fact explicit and sequential (i.e., each code did serve as the basis for subsequent codes), the *travaux préparatoires* of Hague Convention IV (1907) logically includes the entire history from the Lieber Code forward. Furthermore, this research affirms that the practices codified in Convention IV were "both extensive and virtually uniform" for many years.¹⁷⁶ As noted in the introduction, this more comprehensive historical analysis regarding the durability and depth of The Hague Law's roots can only help to enhance the legitimacy and strength of the laws themselves. Lastly, while the United States did not play, as some assert, the "leading role in the codification of the laws of war"¹⁷⁷ the fact that the Lieber Code is the "root" of this family tree of laws, does matter and may contribute modestly to U.S. military lawyers' ability to more

175. BEST, *supra* note 2, at 346 n.44.

176. JANIS, *supra* note 9, at 46.

177. 1 THE LAW OF WAR: A DOCUMENTARY HISTORY, *supra* note 12, at xxii.

effectively communicate the "gravity and preeminence" of particular norms to their commanders.¹⁷⁸

178. Reisman & Leitzau, *supra* note 13, at 5-6.

SWORD AND SWASTIKA¹REVIEWED BY LIEUTENANT COLONEL H. WAYNE ELLIOTT²

In July 1938 General Ludwig Beck wrote of his fellow generals in the German army, "[t]heir duty of soldierly obedience finds its limit when their knowledge, conscience and responsibility forbid the execution of an order."³ Seven years later, World War II in Europe at an end, the limits of soldierly obedience were at the core of the war crimes trials taking place in Germany. The trials dealt with the individual guilt of the top Nazi leadership. But there were broader questions which the Nuremberg Tribunal could not really answer. What had gone wrong in Germany? How had a group of sociopaths like the Nazis managed to take charge of such a sophisticated country? What was the role of the German military establishment in the Nazi accession to power? Could it have been prevented?

Fifty years have now passed since the end of World War II. *Sword and Swastika* was written by Telford Taylor in 1952 and published the same year. Taylor was the chief American prosecutor at the "subsequent proceedings,"⁴ the American trials which followed the trial of the highest ranking Nazis before an international tribunal. At the end of the trials, he left active duty as a Brigadier General and went on to become an accomplished professor of law at Columbia University. He has written several books. His 1992 book, *Anatomy of the Nuremberg Trials*, is an in-depth exploration of the international trial of the top German leadership.

It is impossible to study war crimes and their punishment without a firm understanding of the events which culminated in the trials at Nuremberg. The German generals and Nazi officials who are the subjects of *Sword and Swastika* are no longer household names. Nonetheless, their perception of duty unquestionably had an impact on world history. It was at the core of both the prosecution and defense cases in the post war trials. These largely forgotten generals played a major, though for them undesired, role in the development of international criminal law. Few today

1. TELFORD TAYLOR, *SWORD AND SWASTIKA, GENERALS AND NAZIS IN THE THIRD REICH* (Barnes and Noble 1995); 413 pages, \$9.98 (hardcover).

2. Judge Advocate General's Corps, U.S. Army (retired); Former Chief, International Law Division, The Judge Advocate General's School, Charlottesville, Va.; B.A., The Citadel; J.D., University of South Carolina; LL.M., S.J.D., University of Virginia.

3. TAYLOR, *supra* note 1, at 358.

4. The "subsequent proceedings" were the trials held for the second tier of the Nazi leadership before American courts in occupied Germany. There were twelve such trials.

would argue that the soldier can not be held criminally responsible for obvious violations of the law of war simply because a superior officer ordered them.⁵

The conflict in the former Yugoslavia has again focused attention on war crimes. The renewed attention paid to war crimes and the desire to commemorate the post war trials led to republication of *Sword and Swastika* in 1995. As Telford Taylor wrote in the preface, "we are scanning here a past which is part and parcel of the present."⁶ That is as true today as when it was written almost forty-five years ago. An international tribunal has been established at The Hague to try war criminals from the conflict in Yugoslavia. Because of the huge number of violations of the law of war in Yugoslavia, the court "should aim at higher officials who have guided or at least benefited from the atrocities that anger the world."⁷ Several generals from the war in Yugoslavia have been indicted for their part in war crimes. One general was actually taken into custody.⁸ It can be expected that as trials get underway for this latest crop of war criminals many will plead, "I was only following orders." That prospect makes this book once again worthy of study and review.

Sword and Swastika is actually about two periods in post World War I Germany. First, the fifteen years from the end of the war until Hitler's assumption of power. During those fifteen years the German army's attention was devoted to maintaining itself as a viable military force. Like many peacetime armies it was confronted with manpower, supply and equipment problems. But, unlike most armies, the solution to these problems often had to be undertaken in secret. At the same time that the army was fighting for its material existence, its leadership, schooled in the pre-

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5. The United States Army manual on the law of war sets out the rule: The fact that the law of war has been violated pursuant to an order of superior authority, whether military or civil, does not deprive the act in question of its character as a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.

U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE, para. 497 (July 1956).

6. TAYLOR, *supra* note 1, at 7.

7. James C. O'Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AM. J.I.L. 639, 651 (1993).

8. The general was Djordje Djukic. William Drozdiak, *U.N. Indicts Bosnian Serb General*, WASH. POST, Mar. 2, 1996, at A14. He was released by the Tribunal because of his failing health and died in May 1996.

war image of the Prussian soldier, strove to maintain the historic role of the officers corps as the custodian of the German *geist* (spirit). The use of the word *sword* in the book's title is an indication of the importance of the army during this period.

After Hitler's assumption of power in 1933 and his renunciation of the Treaty of Versailles⁹ in 1935, rearmament could be public. The army was the obvious beneficiary of the renunciation and might have resumed its historic place in German society. But the army's second function in German society, custodian of the *geist*, was now in the firm control of a new group, the Nazis. That period from 1933 to end of World War II is the *swastika* in the title.

For the German general staff the genesis of World War II was World War I. The surrender of the German government in 1918 astonished many German soldiers and officers. They believed that the war might yet have been brought to a successful conclusion or at least a peace more in keeping with German objectives might have been negotiated. The Treaty of Versailles placed severe restrictions on the German military establishment. The Treaty's provisions concerning the payment of war reparations also had devastating economic consequences for Germany. Article 231 of the Treaty placed responsibility for the war squarely, and solely, on Germany.¹⁰ That provision "provoked instant, vehement, and lasting resentment"¹¹ by the German people. The German people often referred to the treaty as the "*Diktat*" of Versailles, a description which implied that it was more in the nature of a unilateral decree by the allies than a mutually arrived at international agreement. The perceived unfairness of the treaty became the rallying cry for many of the fledgling political parties in post war Germany and at the forefront of the hostility toward the treaty was a small political party in Bavaria—the Nazis.

The German military was directly impacted by the Treaty. It restricted the German army to no more than 100,000 men, of which no more than 4000 could be officers.¹² However, the mandated reduction in size had an unintended benefit for the German army. With millions of World War I soldiers from which to choose, the German General Staff¹³ was able to select soldiers of real quality. These would form the core of

9. Treaty of Versailles, 28 June 1919, 2 BEVANS 43, 13 AM. J.I.L. (Supp) 151 (1919) [hereinafter Treaty]. The United States did not ratify the Treaty of Versailles.

10. *Id.* art. 231.

11. A. LENTIN, GUILT AT VERSAILLES xi (1984).

12. Treaty, *supra* note 9, art. 160.

German military leadership during the years between the wars and the nucleus of the German army in World War II.

In spite of the various attempts to get around the Treaty's provisions, it remained a legal document of major consequence. The German army judge advocate issued an opinion that the Treaty was the "law of the Reich" and its provisions were "binding on all members of the Reich."¹⁴ Officers who endeavored to violate the terms of the Treaty could be indicted for "culpable violation of their official duties."¹⁵ As a result, the rearmament of Germany was clandestine. The general staff could not publicly admit that there were on-going efforts to rebuild the German forces.

On 2 August 1934, Field Marshal Paul von Hindenberg died. Hindenberg was a hero of World War I and served as *Reichspräsident* at the time of his death. Hindenberg personified the *ancien régime* and his death "marked the true birthday of the Third Reich."¹⁶ Adolf Hitler, then the Chancellor, promptly also assumed the office of *Reichspräsident* and power was consolidated in one "*Führer*." Soon thereafter, all members of the military were required to take a new oath, not to the State, but to Hitler personally. In the oath each soldier swore "unconditional obedience to Adolf Hitler."¹⁷ That oath would be cited as a defense in many of the post war trials.

Yet, the oath alone does not explain why professional soldiers would fall sway to the demands and ravings of a former World War I corporal from Austria. At least one reason was that after 1935 rearmament was not only open, but continuous. German industry hummed with activity. Rearmament meant riches for many Germans, and a return to prosperity for even more. With that came a welcomed respect for the career soldiers who seemed at least partly responsible for the renewed defense spending. Also, to the delight of many general officers, the Führer avoided interfering in

13. Technically there was no "General Staff." Such a staff was prohibited by the Treaty of Versailles. The Germans, in effect, simply changed the name of the staff to the *Truppenamt* (Troops Office). TAYLOR, *supra* note 1, at 37. For ease of understanding, this review will use the term "General Staff."

14. *Id.* at 55.

15. *Id.*

16. *Id.* at 87. Hitler performed masterfully at the funeral which was held at Tannenberg, site of Hindenberg's greatest victory in World War I. Hitler concluded his eulogy with a Teutonic flourish: "And now enter thou upon Valhalla." JOHN TOLAND, ADOLF HITLER 375 (1976).

17. TAYLOR, *supra* note 1, at 87-88.

internal personnel matters and was quite willing to let the general staff run the military. As long as rearmament continued at a quickened pace, the Fuhrer would defer to the general staff on military matters.¹⁸ However, the rebuilt army came with a cost. Gradually, the Nazi influence began to infiltrate the German officer corps.

The German army's reduced size meant that it had less and less of an impact on the German people. It was simply too small to play its historic role of providing society's elite guard. In 1935 Hitler reinstated compulsory military service and expanded the force structure. The young men conscripted into the Army in the late 1930s had already been indoctrinated; many had been members of the Hitler Youth. The Party, not the army, would be the social center of the people. There was no doubt who served as the new protector of the German *geist*.

It was difficult to deny Hitler's successes. He had rearmed the military and in doing so expanded the economy. The renunciation of the *Diktat* caused him to be seen as a realist who would not let treaties stand in the way of a greater Germany. Hitler was accomplishing what many of the generals hoped for—a Germany which once again was the dominant player on the continent. In short, the leadership of the military establishment disagreed with the Fuhrer only on methods and timing, not on the goal.

However, as war became more likely, many generals grew increasingly reluctant in their support of Hitler. Yet, Hitler appeared to many to be a political, or even a strategic,¹⁹ genius. The rest of Europe stood impotent when German troops marched into the Rhineland, Austria, and Czechoslovakia. Each time, Hitler had correctly predicted the response, or lack thereof, of the world. In the case of Czechoslovakia in 1938, General Beck had predicted a long and costly fight. Beck's pessimism led to his removal as Chief of Staff. Generals who shared Beck's opinions were gradually

18. *Id.* at 115-16.

19. In 1960 Rudolph Hess, then confined at Spandau Prison for war crimes, in a discussion with Albert Speer, also confined for war crimes, quoted German Field Marshal Werner von Blomberg (1878-1946) as having said before the war, "I must say without jealousy that the Fuhrer is the best man Germany has, the greatest strategist alive at this time. In the area of strategy the Fuhrer is absolutely a genius." ALBERT SPEER, SPANDAU 347 (1976). Few would have agreed with that assessment a few years later.

removed from the rolls. In their place came younger men, much more amenable to Hitler's ideas.

The Fuhrer set his sights on Poland in 1939. Many generals again predicted war, arguing England and France were unlikely to stand by silently again. But, by then it was too late. Hitler would no longer listen to those who predicted dire consequences for Germany. "Wolf" had been cried too often. He expected that neither England nor France would actually be willing to go to war over Poland. However, if they did, Germany would probably quickly bring them to the negotiating table. In any event, many Germans and some of the generals believed that Polish territory was rightfully German. Neither the generals, nor Hitler, wanted a generalized European war. But once the process started, it could not be slowed, much less stopped. Millions would die in the ensuing conflagration.

Sword and Swastika is an amazing account of the German military staff and its relations with the Nazis. Much of the information in the book was culled directly from German official documents which made their way into the prosecution's case at Nuremberg. Still more came from the memoirs and diaries written by many of the generals after the war. What emerges is a picture of an army steeped in history and tradition, suddenly, and in their view unfairly, subjected to the mercies of the World War I victors. The Nazis capitalized on the situation. In other circumstances many of the old-line German generals would not have deigned to share a drink with the Nazi leadership, much less power and prestige. The Nazis were often seen as nothing more than street brawlers, a perception which, especially in the early years, was quite accurate. Nonetheless, those same generals came to appreciate the determination displayed by the Nazis. Devotion to the "Fatherland" gradually gave way to the reluctant recognition that the Nazis knew how to use power and the skillful use of that power was crucial to the reemergence of a powerful military establishment. In the process, the Fatherland and the Fuhrer became one and the same.

Were these men weak? The book really does not lead one to that conclusion. Some stood up to Hitler, especially early in his tenure. As time went by and Hitler consolidated his control over the Party, the army, and society, fewer and fewer officers openly challenged him; those who did were usually retired from the active rolls. Hitler was a master at playing

one person against another and, at the same time, leaving each with the impression that he had won the Fuhrer's ear and respect.

When *Sword and Swastika* was first published, it was reviewed in the Harvard Law Review.²⁰ At the time, many feared a return to power in Germany by ex-Nazis. The reviewer wrote that *Sword and Swastika* focused attention on the question, "How did the spirit and mechanism of German aggressive militarism propagate itself in the fifteen years between Armistice Day and the accession of Hitler?" The reviewer then wrote that this book should be on the "must" list for anyone who wants to think straight about NATO and its strategy vis-a-vis Russians and Germans.²¹ The reviewer considered the reaction of the German military to the rise of Hitler to be a useful backdrop in thinking about how NATO might meet a Soviet threat and the role a rearmed Germany might play in NATO. However, so much has changed. The Soviet Union no longer exists and few expect a resurgence of Nazism in Germany. Yet, this book might still find its way to the "must list," not because it is a predictor of what might be, but because it vividly recounts what was.

The German ship of state in the early 1930s was about to embark on a voyage to destruction from which it is only now returning. The captain of that ship was always Adolf Hitler, the passengers were the German people and all the victims of World War II. The question remains. Should the German general staff be considered part of the crew or just first-class passengers? *Sword and Swastika* simply can not answer that question. The reader must decide. Taylor's skillful wielding of his pen makes gathering the background facts easy and enjoyable. No one, however, can make the answer simple.

General Beck, quoted in the first paragraph of this review, challenged Hitler's plans for the conquest of Czechoslovakia and Poland. He retired from the active army just before the beginning of the war. For Beck, at least, he found the limits of his soldierly duty. To stand idly by while Hitler unleashed his terror on the German people was too much. In 1944 Beck was involved in the plot to assassinate Hitler. When the plot failed, Beck committed suicide. Hitler's propaganda ministry reported the General's death with a terse statement that General Beck "is no longer among the living."²² *Sword and Swastika* reminds today's soldier and lawyer that failure to define the limits of soldierly obedience, and to adhere to those limits,

20. W. Barton Leach, *Sword and Swastika*, 66 HARV. L. REV. 1542 (1953).

21. *Id.*

can have dire consequences. General Beck is dead, but the issue of soldierly obedience is still very much alive.

22. DON MCCOMBS & FRED L. WORTH, *WORLD WAR II, STRANGE AND FASCINATING FACTS* 49 (1983).

CHURCHILL ON LEADERSHIP: EXECUTIVE SUCCESS IN THE FACE OF ADVERSITY¹

REVIEWED BY MAJOR JIM FRIEND²

Winston Churchill—the very mention of the name unleashes a flood of powerful emotions and images. In that awful Summer of 1940, France is subjugated; England stands alone, teetering on the brink of collapse. The Luftwaffe relentlessly pounds London. The Thames River is on fire. Yet, amid the drone of sirens, the shriek of falling bombs, and the shattering roar of explosions, there is hope. Rising above this crescendo of destruction, a defiant voice crackles across the air waves:

Upon this battle depends the survival of Christian civilization . . . Hitler knows that he will have to break us on this island or lose the war. If we can stand up to him, all Europe may be free . . . But if we fail, then the whole world . . . will sink into the abyss of a new Dark Age . . . Let us therefore brace ourselves to our duties, and so bear ourselves that, if the British Empire and its Commonwealth last for a thousand years, men will still say, "this was their finest hour."³

Churchill's leadership during the Battle of Britain merely scratches the surface of his legend. His political career spanned five decades. Churchill was one of the youngest cabinet members ever to serve in parliament yet the oldest Prime Minister in English history.⁴ He held nearly ever major cabinet post in the British government, switched political parties twice, endured humiliating defeat, and enjoyed breathtaking success.⁵ He was a prolific writer, a talented painter, and a union certified brick layer.⁶ He had a keen grasp for the importance of technology, and pushed

1. STEVEN F. HAYWARD, *CHURCHILL ON LEADERSHIP: EXECUTIVE SUCCESS IN THE FACE OF ADVERSITY* (Rocklin: Prima 1997); 196 pages, \$20.00 (hardcover).

2. Judge Advocate General's Corps, United States Army. Written while assigned as a student, 46th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

3. WINSTON CHURCHILL: *HIS WIT AND WISDOM* 18-19 (Hyperion Books) (undated materials purchased by author in 1989 at the Churchill Museum in London) [hereinafter *WIT AND WISDOM*].

4. HAYWARD, *supra* note 1, at 22.

5. *Id.* at 22, 122.

6. *Id.* at 22, 124-25; *WIT AND WISDOM*, *supra* note 3, at 8.

the development of the tank and naval aviation.⁷ He had a delightful sense of humor, a lightning wit, often prescient insight, and towering strategic genius. In short, Winston Churchill was one of the most fascinating men who has ever lived.

In writing a book about Churchill's leadership, Steven F. Hayward shouldered a daunting task. His goal was to "dissect the harmonious mix of personal attributes, principles, and practices that contributed to Churchill's success as a leader, and to recombine them at the end to appreciate the whole of what has often been called the *Churchillian style*."⁸ By embarking on such an ambitious course, Mr. Hayward ran a significant risk of falling short of his objective and being second-guessed by a vast legion of Churchill enthusiasts and scholars.

Indeed, Mr. Hayward's major shortcoming is the failure, in his own words, to "recombine [and] appreciate the whole of . . . the *Churchillian style*."⁹ Although Mr. Hayward does a masterful job of describing Sir Winston's leadership principles, practices, and traits, he does not incisively synopsise and explain Churchill's leadership. Such an accomplishment, however, may not have been practicable considering the complexity of the subject matter. In fairness to Mr. Hayward, his goal was not to discover the magic formula that created such a man as Churchill. However, a more complete identification of the sources of Churchill's leadership success would have been appropriate. Was his success primarily attributable to innate genius or experience and hard work? Mr. Hayward could give his readers a more realistic appraisal of those aspects of Churchill's character to be admired and perhaps emulated.

Churchill is a fertile subject for such explorations. It is difficult to find in history another leader who matched his combination of raw talent and experience. Sir Winston was a brilliant man who lived through an incredible diversity of jobs, adventures, triumphs, and disappointments. Perhaps his experiences explain Churchill's remarkable insight. Though I do not believe Mr. Hayward adequately explores this issue, I would recommend this book to anyone who is interested in Churchill or leadership.

7. HAYWARD, *supra* note 1, at 132, 137-41.

8. *Id.* at xx.

9. *Id.*

Mr. Hayward's book is the finest collection of Churchill leadership anecdotes and quotations that I have ever encountered.

In his introduction, Mr. Hayward makes a profound case for the proposition that, to truly learn about leadership, one must study great leaders. He courageously asserts that, "[t]he scribblers of the ivory tower are employing a decayed version of the reductionist way of thinking While [they] chatter on that the world is determined by impersonal forces, business leaders today have come to see ever more clearly the essential role of personal forces in shaping our destiny."¹⁰ Mr. Hayward rejoices in the demise of managerialism and its emphasis on bureaucratic routine.¹¹ He justly criticizes systems analysis and its most notable proponent, Robert McNamara.¹² Mr. Hayward is dead right—charts, graphs and statistics are poor substitutes for the force and vision of personal leadership. He quotes with approval a Wharton School of Finance study that concluded, "[w]e're learning again what the military has known for thousands of years: Leadership is important."¹³

Mr. Hayward's book explains best the most compelling aspects of Churchill's leadership: learning from failure (Chapter 3) and communicating effectively (Chapter 7). Rarely in history has a politician been able to survive, let alone learn from, failures as disastrous as those Sir Winston Churchill endured. The most notable of these occurred during World War I while Churchill was First Lord of the Admiralty.

By 1915, the fighting on the western front had stagnated into bloody trench warfare. Churchill began to openly wonder: "Are there not other alternatives than sending our armies to chew barbed wire in Flanders?"¹⁴ Churchill reasoned that the answer to the trench stalemate was to open up a new front.¹⁵ He looked South toward Turkey, the seemingly weak sister of the Central Powers alliance. Churchill wondered whether a purely naval operation could force open the narrow Dardanelles Strait and subjugate Constantinople, the capital of the decaying Ottoman Empire.¹⁶ Although British strategists had long believed such an operation impracticable due to the capabilities of modern coastal artillery, Churchill asked his staff

10. *Id.* at xviii.

11. *Id.*

12. *Id.* at xix.

13. *Id.* at xx.

14. *Id.* at 33.

15. *Id.* at 34.

16. *Id.* at 35.

whether the Dardanelles could be forced "by ships alone." He was thrilled when the Royal Navy responded that such an attack could succeed "by extended operations with a large number of ships."¹⁷

Churchill pushed his Dardanelles idea through a bitterly divided British cabinet.¹⁸ Ultimately, his purely naval operation gave way to a more ambitious plan for a full-scale amphibious invasion.¹⁹ The British cabinet delayed the operation and issued conflicting orders until the last minute.²⁰ When the attack finally began, the commander of the British fleet lost his nerve when his forces incurred unexpectedly high casualties.²¹ Although the collapse of Turkish resistance was imminent, he halted the attack for one month to wait for the Army invasion force.²² This gave the Turks ample time to react to the threat and prepare elaborate defenses.²³ The result was another trench stalemate and bloodbath. After sustaining 252,000 casualties, the British withdrew their forces from Turkey.²⁴ Thus, the Dardanelles Operation, though brilliant in conception, was severely flawed in execution. Although this was not Churchill's fault, he became the scapegoat for the operation and was dismissed from the cabinet.²⁵ Characteristically, Churchill did not seek to blame those who were more responsible for the Dardanelles fiasco. Instead, he stubbornly defended his original idea and promptly joined the fighting as an infantry battalion commander in France.²⁶ Churchill demonstrated the character of a true leader by persevering through adversity and eschewing the natural temptation to blame others.

According to Hayward, Churchill learned two important lessons from the Dardanelles tragedy: (1) responsibility must be combined with authority, and (2) decisive leadership is essential to military success. Churchill believed that his fatal mistake in the Dardanelles was in "trying to achieve a great enterprise without the plenary authority which could so easily have carried it to success."²⁷ He also believed that the tentative and vacillating

17. *Id.*

18. *Id.* at 36-38.

19. *Id.*

20. *Id.* at 37.

21. *Id.* at 38.

22. *Id.*

23. *Id.*

24. *Id.* at 39.

25. *Id.*

26. *Id.* at 39, 145.

27. *Id.* at 40.

behavior of the British cabinet doomed the operation from the start. He concluded that: "Nothing leads more surely to disaster than that a military plan should be pursued with crippled steps and in a lukewarm spirit in the face of continual nagging within the executive circle."²⁸ Mr. Hayward notes that Churchill's memory of World War I's confused war counsels "led him to be his own defense minister during World War II" so that he could "hold all the reins . . . and press for firm decision."²⁹

Notably absent from Churchill's response to this failure was any effort to hold a grudge, become embittered, or give in to despair. His idea had caused a quarter of a million men to be needlessly maimed, crippled, or killed. His disloyal colleagues laid the blame at his doorstep and walked away. No one could have faulted Churchill if he quit politics altogether.

Churchill is perhaps best known for his rhetorical skills. What is less well-known is that Churchill's brilliant oratory and masterful writing were as much a result of hard work as they were of talent.³⁰ Mr. Hayward shows us the keys to Churchill's success by summarizing Churchill's four principles of effective communication.

As a twenty-four year old army officer in India, Churchill wrote a short essay entitled "The Scaffolding of Rhetoric" in which he described four principles of effective communication.³¹ These principles were (1) correctness of diction, (2) use of rhythm, (3) accumulation of argument, and (4) use of analogy.³² A close analysis of Churchill's speeches reveals that he adhered to these principles throughout his career.³³

Under "correctness of diction," Churchill emphasized the use of short words and clear sentences. He scorned, "those professional intellectuals who revel in . . . polysyllables."³⁴ Churchill preferred clear, direct language because he realized that, to be persuasive, he had to be understood.³⁵

Churchill instinctively grasped the pleasant and compelling effect that rhythm can have on a reader or listener. He wrote that, "[t]he sen-

28. *Id.* at 39.

29. *Id.*

30. *Id.* at 98-99.

31. *Id.* at 99.

32. *Id.* at 100-02.

33. *Id.* at 100-04.

34. *Id.* at 100.

35. *Id.*

tences of the orator when he appeals to his art become long, rolling, and sonorous. The peculiar balance of the phrases produces a cadence which resembles blank verse rather than prose."³⁶ Indeed, Hayward shows us that Churchill wrote his speeches like sonnets, paying careful attention to rhythm and pausing for appropriate emphasis.³⁷

By "accumulation of argument," Churchill meant that, "[t]he end should appear in view before it is reached."³⁸ He asserted that arguments are most effective when, "[a] series of facts is brought forward all pointing in a common direction."³⁹ Hayward points to Churchill's speech after the signing of the Munich agreement as an example of Churchill's use of climax to great effect:

I do not begrudge our loyal, brave people . . . the natural and spontaneous outburst of joy and relief when they learned that the hard ordeal would no longer be required of them at the moment; but they should know the truth. They should know that there has been gross neglect and deficiency in our defenses; they should know that we have sustained a defeat without a war, the consequences of which will travel far with us along our road; they should know that we have passed a milestone in our history, when the whole equilibrium of Europe has been deranged, and that terrible words have for the time being been pronounced against the Western democracies: "Thou are weighed in the balance and found wanting."⁴⁰

Churchill also understood the power of analogy. As Hayward notes, "[t]he beauty of an apt analogy is that it conveys in one or two sentences a truth or insight that is less convincing or clear when explained at more length."⁴¹ Churchill wrote that analogy "appeals to the everyday knowledge of the hearer and invites him to decide the problems that have baffled his powers of reason by the standard of the nursery and the heart."⁴² Regarding the importance of supply in warfare, Churchill once noted,

36. *Id.* at 101.

37. *Id.* at 101-02.

38. *Id.* at 103.

39. *Id.*

40. *Id.* at 104.

41. *Id.* at 102.

42. *Id.*

"[v]ictory is the beautiful, bright colored flower. Transport is the stem without which it could never have blossomed."⁴³

Mr. Hayward notes that Churchill was also a master of "anti-climax."⁴⁴ He cites an occasion during World War II when Churchill, upon hearing that a captured German officer was to dine with Field Marshall Montgomery, replied: "I sympathize with General von Thoma. Defeated, humiliated, in captivity, and—dinner with General Montgomery."⁴⁵

Hayward's book is a valuable addition to the rapidly growing body of literature about leadership. In emphasizing the critical importance of personal leadership, he has taken a bold step in the right direction. If the most effective way to learn about leadership is to study those who have mastered the art, Hayward could not have picked a better subject than Sir Winston Churchill. No one has ever had to lead under more trying circumstances.

Imagine being Churchill in May of 1940! Mr. Hayward does a superb job of helping us put the difficulty of Sir Winston's position at that time into proper perspective. He reminds us that when Churchill became Prime Minister, his party held him in contempt and anticipated that he would soon be replaced.⁴⁶ On his first visit to Parliament as Prime Minister, the members of his own party refused to clap for him.⁴⁷ His first war cabinet meetings were marked by bitter dissension from those who wanted to sue for peace. As the peace element gained support, it appeared that Churchill would soon lose his shaky grip on power.⁴⁸ Churchill realized that his only hope was to bring the issue before the full cabinet for resolution. After summarizing the current war situation, Churchill told his cabinet members that he expected the Germans to offer terms for peace. He explained that if Britain tried to make peace, the Germans would likely demand the Royal Navy as "disarmament."⁴⁹ Churchill reasoned that such a situation would result in England becoming a slave state. He concluded his remarks by telling the full cabinet:

I am convinced that every man of you would rise up and tear me down from my place if I were for one moment to contemplate

43. *Id.* at 82.

44. *Id.* at 104.

45. *Id.* at 105.

46. *Id.* at 146-48.

47. *Id.*

48. *Id.*

49. *Id.*

parley or surrender. If this long island story of ours is to end at last, let it end only when each one of us lies choking in his own blood upon the ground.⁵⁰

There was no more talk of peace. After the meeting, Churchill was mobbed and congratulated by the full cabinet.⁵¹ He had consolidated his position by the sheer eloquence and force of his convictions.

There can be little doubt that the world is a far better place because of Winston Churchill's leadership. Thus, it is not surprising that Churchill is almost universally respected and admired. As Jo Grimond so aptly noted on the occasion of Churchill's death, "[a]ll freedom-loving men and women claim Sir Winston as their own, and mourn his death, and well they may, because it is in large measure due to him that some of us are free at all."⁵²

50. *Id.* at 148.

51. *Id.*

52. WIT AND WISDOM, *supra* note 3, at 8.

THE BOOK OF FIVE RINGS¹

REVIEWED BY MAJOR JEFFREY P. COLWELL²

In *The Book of Five Rings*, Thomas Cleary translates two separate works by two famous Japanese samurai warriors in which each teaches his philosophy on martial arts and combat. Mr. Cleary is no stranger to Asian studies. He holds a Ph.D. in East Asian Languages and Civilizations from Harvard University, but is probably most well known for his translation of Sun Tzu's *Art of War*. Mr. Cleary's translation of *The Book of Five Rings* includes Miyamoto Musashi's *The Book of Five Rings*, and Yagyu Munenori's *Family Traditions on the Art of War*. Each could be considered a memoir of its author, and a textbook for martial arts students.

While each warrior-teacher's goal is to teach the art of sword warfare, the thought process and methodology described has more far-reaching ramifications. Both advocate the idea of absolute mastery of one's skill, which leads to the ability to completely focus and concentrate in periods of stress. These skills are useful in any meaningful endeavor and are particularly useful to today's military members.

Musashi's goal in *The Book of Five Rings* is the student's mastery of the science of martial arts. It is not only a physical description of actual sword maneuvers, but also a manual on a methodology of achieving perfection. Essentially, Musashi preaches a "mind over matter" approach towards his science. The central theme of Musashi's philosophy is that one who has truly become a master at his skill is able to execute effortlessly, without ever really thinking about it. Musashi's teachings evolve through five "rings", or scrolls: the Earth Scroll, the Water Scroll, the Fire Scroll, the Wind Scroll, and the Scroll of Emptiness. Each scroll serves as a chapter in Mushashi's philosophy text. When the student is able to learn

1. MIYAMOTO MUSASHI, *THE BOOK OF FIVE RINGS* (Thomas Cleary trans., Shambala Publications 1993) (1643); 115 pages, \$9.00 (softcover).

2. United States Marine Corps. Written while assigned as a student, 46th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

the lessons contained within each of the scrolls, he has mastered the art of warfare.

In the Earth Scroll, Musashi presents the theme he unfolds throughout the remainder of the Scrolls: "The martial way of life practiced by warriors is based on excelling others in anything and everything."³ He likens martial arts to carpentry. A carpenter, like a warrior, needs to master the use of many tools, and can not rely on any one of them. He also lays out his nine rules to learning his military science:

Think of what is right and true.
Practice and cultivate the science.
Become acquainted with the arts.
Know the principles of the crafts.
Understand the harm and benefit in everything.
Learn to see everything accurately.
Become aware of what is not obvious.
Be careful even in small matters.
Do not do anything useless.⁴

Clearly these rules have universal applicability, and Musashi recognized this. He believed that success in the martial arts led to success in all endeavors.

Musashi teaches the basics of warfare in the Water Scroll. Here he explains the various sword holds, footwork techniques, parries, and strokes. "Water" is an appropriate title as water is basic to all natural things. Musashi states that "[t]aking water as the basic point of reference, one makes the mind fluid."⁵ The simple premise here is that one must learn the basics to a point that they become second nature, before true mastery is achieved.

Musashi focuses on battle and violence in the Fire Scroll. Here he evolves from the basic physical maneuvers described in the Water Scroll to more mental techniques essential for close-in combat with the enemy. In combat the key to success is preemption of the enemy. Musashi advocates putting one's self in the place of the enemy and "becoming the oppo-

3. MUSASHI, *supra* note 1, at 5.

4. *Id.* at 16.

5. *Id.* at 9.

nent."⁶ One who has truly mastered the martial arts need not think about his own actions but must focus on the actions of the enemy.

The Wind Scroll is a critical analysis of other teachers' methods. Musashi is very critical of many of his adversaries' methods because he believes that others take a simplistic approach to martial arts. They seem to concentrate on one particular phase of the martial arts (i.e., footwork or weaponry). He warns of the deficiencies of taking the easy way out and only focusing on one approach area of the art. A master swordsman with poor footwork will falter when matched against an opponent who has mastered both areas.

Musashi concludes with his Scroll of Emptiness, the shortest of the five. Achieving this "emptiness" is the pinnacle of the mastery of the martial arts. Musashi's emptiness refers to the lack of confusion, achieving complete focus and comprehension. "Without any confusion in mind, without slacking off at any time, polishing the mind and attention, sharpening the eye that observes and the eye that sees, one should know real emptiness as the state where there is no obscurity and the clouds of confusion have cleared away."⁷ When one achieves this state of emptiness, one acts without perhaps realizing it and is able to maintain complete control of one's every movement. Musashi's emptiness is almost a surreal state of complete euphoria, where one watches one's own actions in slow motion.

Munenori's goal in his *Family Traditions on the Art of War* is also that of complete perfection of the martial arts. His theme is very similar to that of Musashi, and he, too, advocates a "mind over matter" approach. His work however, unlike that of Musashi, incorporates much of the Chinese Zen principles into it. He summarizes Zen philosophy as "[f]orgetting learning, relinquishing mind, harmonizing without self-conscious knowledge thereof, [which] is the ultimate consummation of the Way."⁸ His work is divided into three sections or "swords": the Killing Sword; the Life-Giving Sword; and No Sword. Mr. Cleary explains to the reader that

6. *Id.* at 41.

7. *Id.* at 59.

8. *Id.* at 69.

these titles "are Zen Buddhist terms adopted to both wartime and peacetime principles of the samurai."⁹

In the *Killing Sword*, Munenori essentially describes combat and the use of force. Munenori is not a warmonger, but believes that combat and killing serve a necessary function. He states, "[i]t [killing] is a strategy to give life to many people by killing the evil of one person."¹⁰ In his *Life-Giving Sword*, Munenori focuses on anticipating the enemy's move, and preempting him. His ideas here are very similar to those of Musashi in his *Fire Scroll*. Munenori stresses the need to keep one's mind on track, and not let it wander or fixate on any one aspect of a confrontation. In his *No Sword*, Munenori stresses the need to be able to act without a sword, and instead use whatever resources are available. Here he re-emphasizes that the key to the martial arts is not the weapon, but the mind.

In comparing the two works, Munenori seems a bit more flexible than Musashi. Musashi essentially advocates that only his way is the right way, and leaves no room for any deviation. He constantly focuses on "my" way, or "my individual school", whereas Munenori seems to care less about the means and more about achieving the end.

From the limited introduction provided in the book, we learn that Musashi essentially lived in isolation, forgoing any of life's pleasures, and dedicated himself to the study of the martial arts.¹¹ He was so enthralled in his cause, that he was likely oblivious to any presumption of self-centeredness in his work. Munenori, on the other hand, was actively involved in society with the Government.¹² Additionally, Mr. Clearly points out that Munenori also had not completely mastered Zen himself.¹³ This history might account for Munenori's more tolerant attitude towards his teachings.

Musashi and Munenori lived in much simpler times, where a person's place in society was more clearly defined. The "warrior" of today is dramatically different than the samurai warrior of the 1600's. However, the ideas of Musashi and Munenori are still applicable in a metaphorical sense to almost any endeavor. Japanese businesses seem to follow practices similar to those advocated by Musashi and Munenori. They are an incredibly

9. *Id.* at xviii.

10. *Id.* at 68.

11. *Id.* at xvi-xvii.

12. *Id.*

13. *Id.*

driven people, with a strong ability to focus on the task at hand.¹⁴ This focus is of the sort advocated by Musashi and Munenori, and helps to explain Japan's economic success after World War II. While the importance of the martial arts in western society is not as pronounced as in the East, commanders and business leaders can learn much from acquiring the discipline necessary to practice them.

One of the most remarkable modern day parallels that I drew from Musashi's work was with our Marine Corps' current doctrine of maneuver warfare. The concepts these two gentlemen described over three hundred years ago are echoed today by the Marine Corps in one of its doctrinal publications: "Maneuver warfare is a warfighting philosophy that seeks to *shatter* the enemy's cohesion through a series of *rapid, violent, and unexpected* actions which create a *turbulent and rapidly deteriorating situation* with which he *cannot cope*."¹⁵

In maneuver warfare, the Marine Corps seeks to strike where the enemy is the weakest rather than confronting him head on, strength against strength. These weak areas are referred to as "gaps." Examples of gaps are areas such as the enemy's rear area or his supply compounds.¹⁶ Musashi calls these "gaps" "corners" in his Fire Scroll. He describes the tactic of "coming up against corners" and explains that, "[a]s the corner collapses, everyone gets the feeling of collapse."¹⁷ Musashi emphasizes causing "upset"¹⁸ to the enemy; "flustering"¹⁹ the enemy; and "knocking the heart out"²⁰ of the enemy. Musashi wrote his treatise back in 1643 aimed at the individual warrior, but we see today how his concepts are everlasting. They are applicable to those on the modern day battlefield.

The philosophies of each author are simple to understand, but difficult to master. Musashi himself acknowledges throughout his text that his science does not come easy: "This requires thorough training and practice,"²¹ or "Study carefully."²² As the book progresses, the reader is drawn to find ways to apply the ideas presented. Military attorneys can draw things out

14. I have observed this after living in Japan for three years.

15. FLEET MARINE FORCE MANUAL 1, WARFIGHTING 59 (6 Mar. 1989) (emphasis added).

16. *Id.* at 74-75.

17. MUSASHI, *supra* note 1, at 43.

18. *Id.* at 42.

19. *Id.* at 44.

20. *Id.* at 46.

21. *Id.* at 28.

22. *Id.* at 31.

of this book that are useful in the courtroom. The ability to always preempt one's opponent is vital in the courtroom. In order to achieve true greatness in the courtroom an attorney must be able to act almost solely on instinct (and do so correctly) without pause. To react in this manner would equate to actualizing Musashi's Scroll of Emptiness. This book of wisdom from the past is highly recommended because the principles presented can benefit anyone regardless of age, social milieu, or historical time period.

TRUTH OR JUSTICE¹REVIEWED BY MAJOR EDWARD J. MARTIN²

A recent trial in the New York State Supreme Court involved a defendant charged with robbing a Belgian tourist in midtown Manhattan. Plainclothes police observed the entire incident. After being interviewed and providing personal information, the victim returned to Belgium and refused to come back for the trial. The defense counsel requested a jury instruction that the government's failure to produce the witness should permit the inference that, if called, the witness would not support the prosecution's case. During argument, the defense counsel admitted telephonically speaking with the witness and that the victim stated the defendant robbed him. Judge Harold J. Rothwax asked, "Doesn't your own statement belie the information you're seeking?" The defense counsel replied, "It does, but my client is entitled to it."

It is this type of conflict between the truth and rights granted to defendants in our criminal justice system that troubles Judge Rothwax. Judge Rothwax has been a member of the New York State Supreme Court for twenty-five years. He has thirty-seven years of experience in criminal law, including twelve years as a defense counsel. In his book *Guilty: The Collapse of Criminal Justice*, the judge uses compelling anecdotes to provide examples of problems with the American justice system. In layperson terms, Judge Rothwax uses cases he presided over, United States Supreme Court cases, the O.J. Simpson trial, and the discussions of legal commentators to conclude that the concept of fairness in criminal procedure has transcended the concern for truth.

To Judge Rothwax's credit, not only does he point out problems with the criminal justice system, but he attempts to provide commonsense answers to these issues. Judge Rothwax finds problems throughout the system; from the police investigation stage to jury verdicts. Many of the suggested solutions involve increased deference to the judiciary. Legal

1. HAROLD J. ROTHWAX, *GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE* (Random House, New York 1996); 238 pages, \$23.00 (hardcover).

2. Judge Advocate General's Corps, United States Army. Written while assigned as a student, 45th Judge Advocate Officer Graduate Course, The Judge Advocate General's School, United States Army, Charlottesville, Virginia.

commentators have criticized the more controversial proposals. However, Judge Rothwax sees his role as standing at the center of the adversarial system and keeping the scales in balance. While he often seems partial toward the prosecution, the truth is his objective. Judge Rothwax's most controversial suggestions surround the Warren Court's interpretations of the Fourth, Fifth, and Sixth Amendments to the United States Constitution.

The Court's interpretation of the Fourth Amendment is what guarantees that justice will not be done. The judge illustrates a number of cases in which people who are "clearly guilty" have evidence suppressed due to technical errors. One case involves a kidnapped child who, upon being freed from captivity in the defendant's apartment, leads the police to weapons in the apartment. Since the police did not have a search warrant, and the weapons were not in plain view, the weapons were suppressed. The judge criticizes a law that protects the privacy of a man when the facts prove that he locked a child in an apartment for four days. However, the Judge does not explain where in the Fourth Amendment it says that individuals who are guilty of serious crimes are no longer protected from unreasonable searches and seizures. The judge indicates that the benefits of the exclusionary rule in protecting the privacy of citizens are greatly outweighed by its burden on the truth bearing process. He proposes making the exclusionary rule discretionary, and allowing judges to utilize reasonableness as a guide.

Judge Rothwax also believes that decisions relating to *Miranda* rights have led to "judicial chaos." He feels the Supreme Court was mistaken in attempting to create an objective standard that would free courts from the task of determining whether a defendant was actually coerced into making a confession. The judge feels that *Miranda* requires the police to urge suspects not to confess, thereby providing guilty individuals with a fair chance to escape. He feels rules such as *Miranda* make a criminal trial into a sporting contest in which the public is indifferent about the outcome. The judge argues that such indifference is hardly appropriate in the administration of justice and that the *Miranda* rules result in decreasing the likelihood that people will take responsibility for their crimes. These rules force courts to decide between finding inventive ways to circumvent the law or suppressing an otherwise voluntary statement. Judge Rothwax concludes that *Miranda* should be overruled. He claims that videotaping and other

technology can now prevent the coercion which *Miranda* was designed to prevent.

Judge Rothwax's interpretation of the Sixth Amendment also differs from that of the Supreme Court. He agrees that the Sixth Amendment provides a right to counsel as an essential component of the right to a fair trial. However, Judge Rothwax insists that the Sixth Amendment provides no right to counsel during police investigations. He maintains that to argue otherwise would assist defendants in protecting themselves against the possibility that an investigation will be successful. New York courts provide suspects even more protections than required by the Supreme Court. In one murder case, the suspect (West) was represented by counsel during a lineup. At that time, the defense counsel instructed the police not to question West in counsel's absence. West was not charged, but three years later the police arrested another individual (Davenport) for an unrelated offense. Davenport admitted his involvement in the earlier murder and agreed to tape conversations with West in exchange for leniency. West made incriminating statements which after conviction were suppressed on appeal by the New York Court of Appeals which held that the police had the burden to determine whether or not representation continued even three years after the right to counsel first attached. Judge Rothwax maintains that asking questions and receiving answers from a suspect is a legitimate aspect of conducting criminal investigations. He believes the right to an attorney should not become a factor during the investigation stage.

Judge Rothwax's recommendations that are the most controversial with defense attorneys include his views on discovery and the defendant's right against self incrimination. He believes that defense attorneys regularly take unfair advantage of liberal discovery guidelines to manipulate the system. The problem is that discovery provides the defendant with a complete overview of the government's case without requiring from the defendant, his own version of the facts. An example used by the judge is a recent case in which a Lebanese man shot at a van carrying Hasidic students. Upon arrest, his attorney first claimed that his client was innocent because he was not present at the scene of the shooting. Upon receipt of discovery placing the defendant at the scene, the defense claimed self-defense. When later discovery indicated that the students did not threaten or attack the accused the defense theory of the case switched to insanity.

In another example of this use of discovery, O.J. Simpson's attorney, Robert Shapiro, early in the case, stated that his team would devise a defense after they knew what the state had to offer. The judge notes that

O.J. Simpson's defense later changed their initial story that Simpson was sleeping at the time of the murders once discovery revealed that he had made cellular phone calls at that time. To avoid such "manipulation" the judge believes that access to the government's case should be conditioned upon the defendant's willingness to give up the right to misuse the evidence. His "sealed envelope proposal" would require formally charged defendants who want discovery to write down their version of the facts and seal them in an envelope. After presenting this envelope to the judge, the defense would receive discovery. The envelope is never opened unless the defendant testifies. If the defendant testifies, the envelope is opened to ensure his initial version of the facts is consistent with the trial testimony. The government would be able to impeach the defendant with the initial statement if there are any major inconsistencies.

In addition, if the defendant fails to testify and the evidence presented indicates the defendant could reasonably explain or deny the evidence, the judge would have discretion to instruct jurors that they may consider the defendant's failure to testify. Judge Rothwax interprets the Fifth Amendment literally. He argues that although no person can be compelled to testify against himself, there is no prohibition against drawing an adverse inference from a defendant's failure to testify. Unfortunately, the judge does not discuss the fact that such a judicial instruction may in fact force defendants to testify against themselves or commit perjury on the witness stand. Such an instruction might also prevent candid conversations between defense attorneys and their clients.

Judge Rothwax also recommends a number of reforms that are already part of Military Criminal Procedure. These include such areas as speedy trial rights, jury preemptory challenges and allowing less than unanimous verdicts. While the judge believes that accused citizens have a right to a speedy trial, he feels that speedy trial statutes based on a precise formula of days and weeks only protect those who are most interested in getting away with crimes and manipulating the system. A New York case cited involved a defendant and his attorney who arrived at court for an arraignment. They sat in the back of the courtroom without informing anyone of their presence. Due to an administrative error, the case was not called. By the time the government realized their error, the indictment had to be dismissed due to a speedy trial violation. Similar to the military rules, Judge Rothwax recommends that speedy trial issues be determined based on the reasonableness of the delay and the potential prejudice to the defen-

dant. In addition, the judge would consider the defendant's desire and willingness to accept a speedy trial.

Judge Rothwax seems to have lost faith in the jury system. He believes that "educated" people are either excused from jury duty or are preempted by defense attorneys. Since a vast majority of defendants are guilty, defense counsel seek jurors who cannot evaluate the evidence. The judge believes that the jury in the O.J. Simpson case was the product of this process. Judge Rothwax argues that the O.J. Simpson jury failed to examine the evidence, and their post-trial statements indicate they made no distinction between factual evidence and attorney suggestion. Judge Rothwax suggests limiting the number of preemptory challenges in a criminal case to three or less. He also believes that efficiency would be increased without harming accuracy by permitting jury verdicts of eleven to one or ten to two.

The reaction to Judge Rothwax's book was diverse. Nonlegal commentators were quick to agree that the book provided examples of serious problems with our legal system, and commonsense solutions to those problems.³ However, legal commentators seem critical of the book. Most argue that relatively few cases are dismissed or result in an acquittal due to technical errors in criminal procedure, or legal rulings that protect defendants.⁴ The outcome of most cases are determined by the facts. In addition, commentators feel the judge oversimplified many constitutional issues⁵ and that he failed to discuss recent Supreme Court decisions that carved out exceptions to the rules that provide protection to defendants, such as the good faith exception to the exclusionary rule.⁶

Judge Rothwax's book is not designed to be an academic analysis of complex legal issues. The judge is an interesting story teller with some innovative ideas. Lawyers may find themselves disappointed with the book's simplicity, but it is an entertaining and thought provoking look at some important criminal law issues.

3. Richard Bernstein, *Judge Says Too Many Rights Is All Wrong*, SUN-SENTINEL (Ft. Lauderdale, Fla.), Feb. 25, 1996, at 9D, available on N.Y. TIMES NEWS SERVICE.

4. Edward P. Ryan Jr., *Jaded View Of Justice*, MASS. LAWYERS WEEKLY, Apr. 1, 1996, at B4.

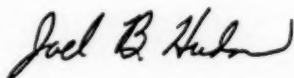
5. Harry I. Subin, *Where's The Collapse?*, N.Y. L.J., Apr. 25, 1996, at 2.

6. Jim Zafris, *Judge Delivers Simplistic Verdict on Justice System*, THE PLAIN DEALER (Cleveland, Ohio), Mar. 31, 1996, at 12.

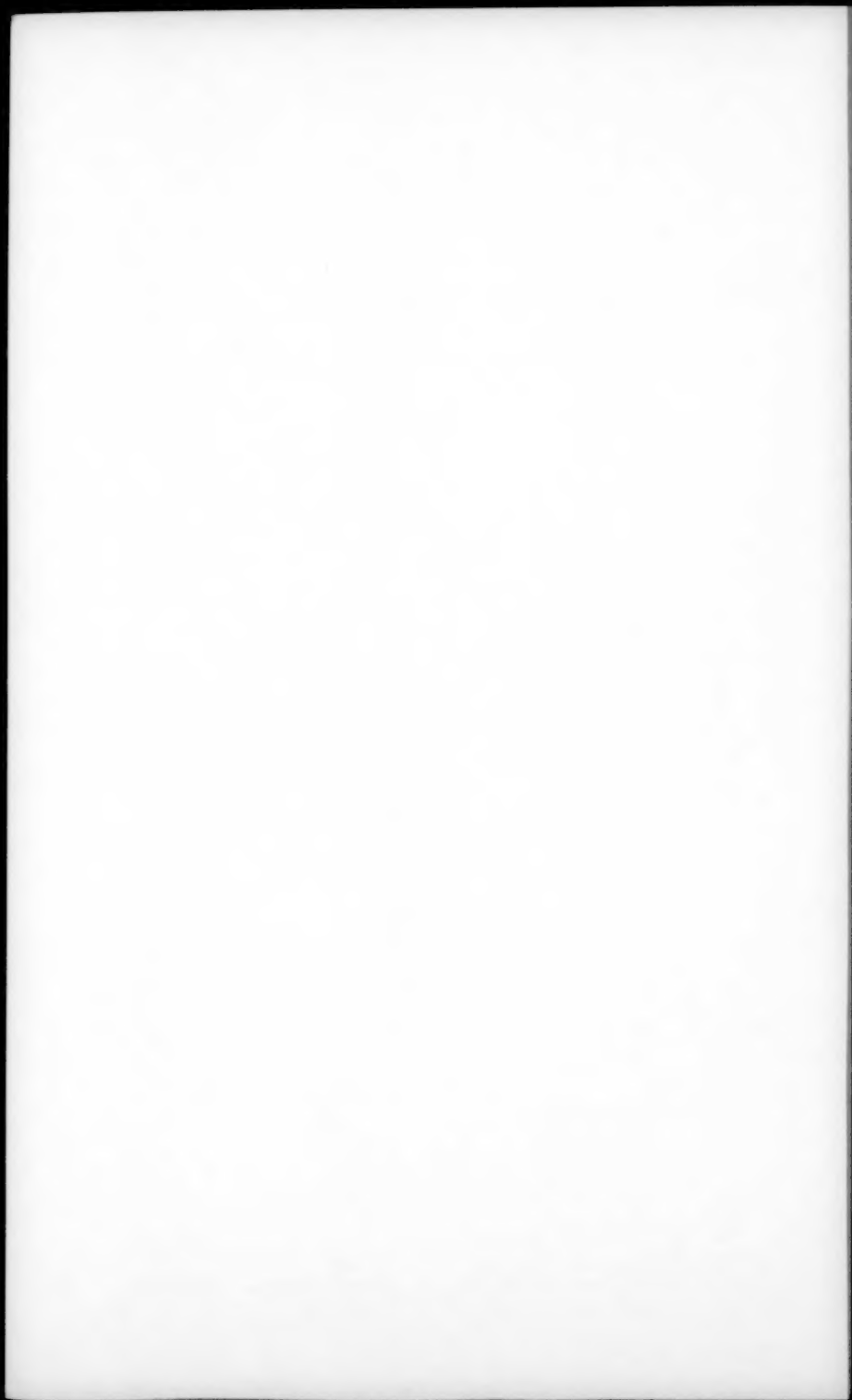
By Order of the Secretary of the Army:

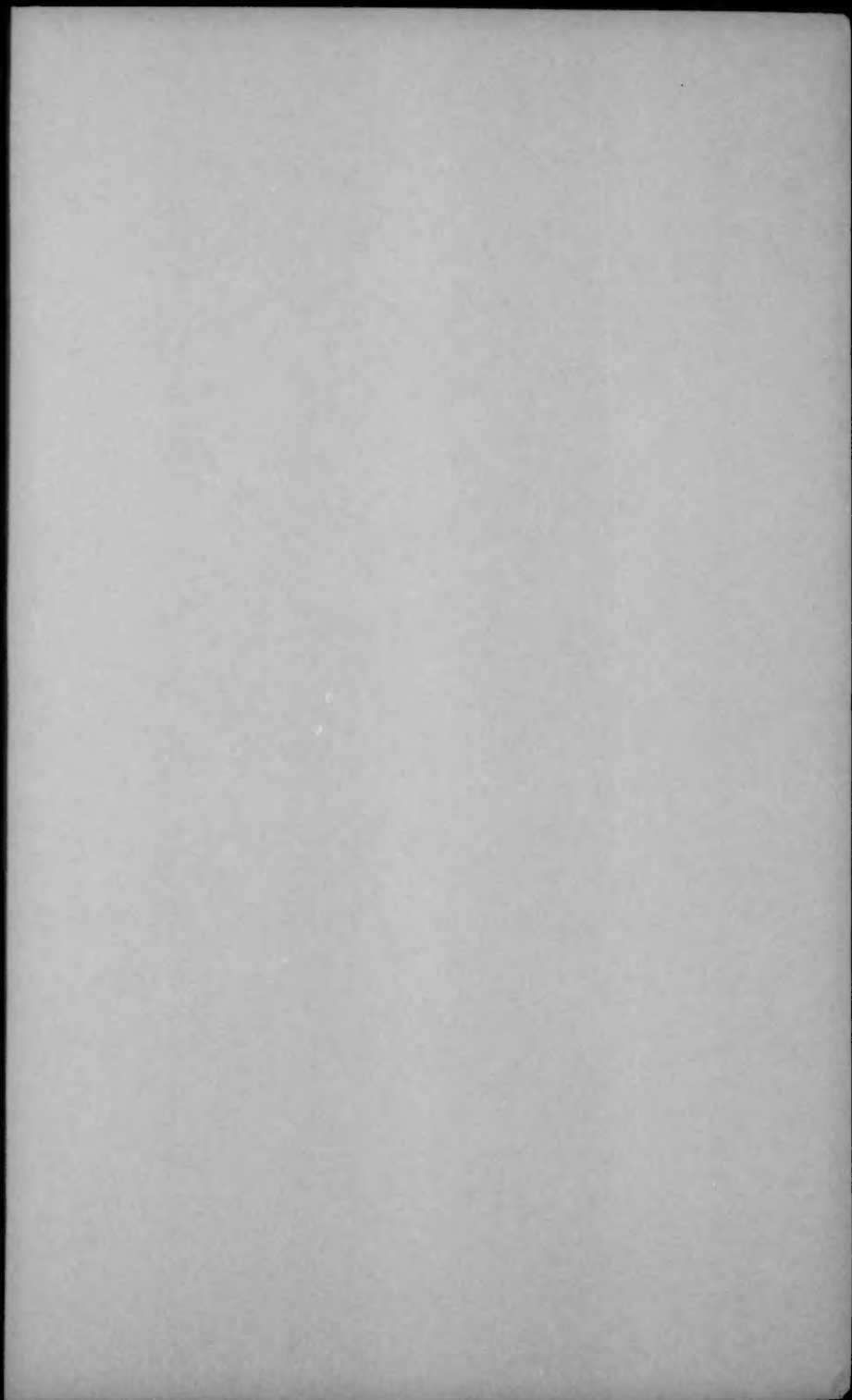
DENNIS J. REIMER
General, United States Army
Chief of Staff

Official:

A handwritten signature in cursive script, reading "Joel B. Hudson".

JOEL B. HUDSON
Administrative Assistant to the
Secretary of the Army
04767





PIN: 076491-000

